Supreme Court, U. S.
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80-514

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION No. 137; LOCAL UNION No. 150; LOCAL UNION No. 278; LOCAL UNION No. 296; LOCAL UNION No. 315; LOCAL UNION No. 386; LOCAL UNION No. 431; LOCAL UNION No. 439; LOCAL UNION No. 490; LOCAL UNION No. 533; LOCAL UNION No. 588; LOCAL UNION No. 624; LOCAL UNION No. 890; LOCAL UNION No. 912; and LOCAL UNION No. 980, all affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

v.

FRITO-LAY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether economic strikes following unsuccessful separate negotiations with each of a group of competing employers may be found to have an object of requiring them to join an employer organization, within the proscription of Section 8(b)(4)(A) of the National Labor Relations Act, upon the basis of evidence that the striking unions seek uniformity of contract conditions for all of the struck employers following the dissolution of a multi-employer, multi-union bargaining unit in which the employers and unions previously bargained.

In the event the Petition is granted to determine the foregoing question, it is requested that the Court accept the following additional questions for resolution:

2. Whether the striking unions in this case abandoned their objective of seeking uniformity of contractual conditions among the struck employers prior to the institution of the strike, thereby precluding a finding that the strike had an object within the proscription of Section 8(b)(4)(A) of the National Labor Relations Act.

3. Whether the damage award in this case can be sustained on the finding that the striking unions violated Section 8(b)(4)(A) of the National Labor Relations Act in view of the conceded fact that the strike was waged to secure economic benefits and improved working conditions.

STATUTORY PROVISIONS

The following provisions of the National Labor Relations Act, as amended (29 U.S.C. Section 151, *et seq.*), hereafter called the Act, are involved in this case:

> Section 8 . . .
>
> (b) It shall be an unfair labor practice for a labor organization or its agents —
>
> (1) to restrain or coerce . . . (B) an employer in the

selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

Section 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The above-named Petitioners petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 623 F.2d 1354 (1980), and is reprinted in Appendix A to this Petition. The Memorandum of Opinion of the United States District Court for

the Northern District of California, denying Petitioners' motion to dismiss the amended complaint, is reported at 401 F.Supp. 370 (1975), and is reprinted in Appendix B to this Petition. The District Court did not write an opinion in making its final determination on the merits of the case, or in making its award of damages. The Findings of Fact and Conclusions of Law of the District Court following trial on the merits of the case are reprinted in Appendix C to this Petition. The Findings of Fact and Conclusions of Law of the District Court in making its award of damages are reprinted in Appendix D to this Petition.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit which this Petition seeks to have reviewed was entered on July 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The District Court entered a judgment in the amount of $688,518.00 against Petitioners, hereafter referred to as the Unions, based upon its finding that the Unions had engaged in a strike which violated Section 8(b)(4)(A) of the Act.[1] Specifically, the District Court, following trial without a jury, found that an object of the strike was to require Respondent, hereafter referred to as Frito-Lay, to "join [an] . . . employer organization" within the meaning of Section 8(b)(4)(A) of the Act. The strike followed unsucessful negotiations between the Unions and Frito-Lay for a collective bargaining agreement in 1974. During the

1. Jurisdiction of the District Court is based upon Section 303 of the Act (29 U.S.C. Section 187), which authorizes suits for damages based upon violations of Section 8(b)(4) of the Act.

period of the negotiations the Unions were concurrently bargaining for uniform economic benefits and working conditions with two of Frito-Lay's competitors, whose employees the Unions also represented. The Court of Appeals affirmed the decision that the Unions violated the Act, but remanded the case for a recomputation of damages.

The underlying facts may be summarized as follows:[2]

A. Background—the relationship between the parties.

Frito-Lay is engaged in the manufacture and distribution of various snack food products. Granny Goose Foods, Inc. and Laura Scudder's are competitors of Frito-Lay engaged in the same business. The Unions comprise fifteen local unions affiliated with the International Brotherhood of Teamsters. The Unions represent warehousemen and route salesmen employed by Frito-Lay, Granny Goose and Scudder's in Northern and Central California and in Reno, Nevada.

Prior to the events in this case the three Employers and the Unions had bargained on a multi-employer, multi-union basis for a period of some fourteen years. Successive agreements had been reached during this period covering all three Employers and the Unions; it was the practice for a single agreement to be executed covering all parties, with uniform terms and conditions applicable to each.

Sometime prior to the expiration of the collective bargaining agreement on February 28, 1974, Frito-Lay gave timely notice of its intent to withdraw from the multi-employer, multi-union bargaining arrangement and to

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2. References to the record in this proceeding are not made with respect to facts which are contained in the opinion below, or in the Findings and Conclusions of the District Court. Record references are made with respect to facts which are not specifically referred to by the District Court and the Court of Appeals, or where the underlying evidence is helpful to an understanding of facts accepted by the courts below.

negotiate for a new agreement separately with the Unions.[3] Shortly thereafter, Granny Goose submitted a similar notice of its intent to bargain separately. The upshot was that the multi-employer organization was dissolved for the 1974 negotiations.

Frito-Lay's decision to withdraw from the multi-employer organization was motivated by its desire to establish a compensation structure for its route salesmen which would emphasize commissions and reduce base pay.[4] The significance of Frito-Lay's objective in the forthcoming contract negotiations was fully understood by the Unions in the light of market place conditions which were familiar to all of the bargaining parties. Thus, the three Employers compete, through the efforts of their respective route salesmen, for display space at the retail stores where their products are sold to consumers. The success which a route salesman enjoys in increasing sales not only enhances the profits of his Employer and his own commission, but is likely to have a negative impact upon the earnings of other route salesmen represented by the Unions who work for one or the other of the Employers. This economic fact explains in large measure the willingness of the Unions to bargain for a single, uniform labor agreement down through the years, and their efforts to continue uniformity in the terms and conditions of the contracts for all three Employers which were to be negotiated in 1974.

It should also be noted that Frito-Lay, in opting for separate bargaining in 1974, was fully aware that it would

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3. Frito-Lay did not seek separate bargaining with each of the local unions within its respective jurisdictional area. It desired to negotiate a single contract with uniform terms and conditions covering all of its employees represented by the Unions.

4. Prior contracts had historically provided for commission payments to route salesmen, but had also provided for a base rate of pay to which the salesmen were entitled irrespective of the volume of their sales.

be impossible to insulate itself entirely from the effects of the Unions' concurrent negotiations with the competitors with whom it had joined in negotiating prior agreements. As testified by Frito-Lay's spokesman, Leonard Clegg, "Unfortunately, we are not 'an isle unto ourselves,' and our three competitors will have some impact on Frito-Lay negotiations" (Clegg Depo., Exh. #3; Clegg Depo. Tr., p. 37). Clegg was apprehensive that Frito-Lay would be "whipsawed" in separate negotiations; *i.e.*, that the Unions would pit the Employers against one another by confronting each with concessions made by the others (Clegg Depo., pp. 46-47, 159). To offset this possibility, Frito-Lay and Scudder's agreed at the outset of negotiations that they would exchange information concerning their separate bargaining meetings with the Unions (Clegg Depo., Exh. #21; Clegg Depo., Tr. 91-93). In addition, Frito-Lay concurred in Scudder's assessment that Granny Goose was the most likely of the three to capitulate to the Unions' contract demands, and approved Scudder's proposal that Granny Goose be requested to abstain altogether from negotiations upon a commitment to the Unions that it would accept whatever agreements resulted from the bargaining with Frito-Lay and Scudder (Clegg Depo., 43-44).

In summary, when bargaining began in early 1974, the multi-employer organization no longer existed but all parties were aware that there would be an inevitable interrelationship between the separate sets of negotiations. The open line of communication which Frito-Lay maintained between the Employers thus qualified to some extent the separateness of the bargaining that took place.

B. The 1974 negotiations.

The Unions selected a single negotiating committee to handle bargaining with all three of the Employers. At the Unions' request, the three Employers, by their separate representatives, attended the initial meeting on January 28, 1974 together to receive the Unions' contract proposals. The Unions submitted the same proposed agreement to all three Employers, and requested that further joint meetings be scheduled. The Employers declined to meet jointly, and reasserted their intention to bargain separately. The Unions made clear at this meeting, and at various times thereafter until shortly before the strike, that they were seeking either a single agreement which all Employers would sign, or separate agreements with each Employer which would contain uniform provisions.

The bargaining which followed the initial meeting was conducted with each Employer separately, in accordance with the Employers' wishes. At times, however, meetings were arranged (with the assistance of a federal mediator) for the same time and in the same building, and the Employers consented on some occasions to meet together with the Unions.

From time to time the Unions presented to Frito-Lay, or to one of the other Employers, proposals which had been accepted by another Employer (Clegg Depo., 119-121). Also at various times the Unions informed Frito-Lay that they would agree to a proposal submitted by that Employer if it were accepted by the other two Employers. In mid-April, with no agreement in sight, the Unions put together a composite proposal including the provisions most favorable to the employees which had been agreed upon by at least one of the Employers, and presented it to all three Employers (Pl. Exh. 16, Tr. 28, 272, 275). Some of the Unions' proposals made to Frito-Lay from time to time were rejected

on the ground that they had no application to Frito-Lay's operation.[5]

On four separate occasions—February 23, March 30, April 27 and May 11—the Unions submitted each of the Employers' outstanding proposals to its members for approval or rejection. The votes were taken for each proposal, which of course was directed to the employees of the particular Employer, among the Unions' membership employed by all three Employers. This procedure of group voting was objected to by the Employers, who requested that the proposal of each be presented to its employees alone. The Unions' procedure in this respect is allowed by the Constitution of the International Brotherhood of Teamsters in situations where, in the judgment of the local union, members not employed by the particular employer who makes a proposal have a substantial interest in the outcome of the negotiations (Def. Exh. #31, Tr. 325).

On May 1, 1974, the Unions informed the three Employers that they would be willing to consider non-uniform compensation provisions tailored to the needs of the individual Employers. The compensation structure had been the most difficult of the issues in bargaining, and was the basis of

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5. These proposals related to job classifications which Frito-Lay claimed did not exist in its work force, although they did have application to one or the other of the three Employers. In some instances the Unions disputed the claim that the classifications were inapplicable to Frito-Lay (Tr. 248, 252-253; 144-145). In other instances, the Unions' position was that the disputed classifications should remain in the contract to cover the possibility that Frito-Lay might employ someone in the future in that classification (Tr. 252, 254). It should be noted that Frito-Lay also requested a special low commission provision for so-called "private label" products, even though it did not perform private label work. The proposal was presented because Frito-Lay had been informed (erroneously) that the Unions had agreed to such a provision with Granny Goose. The proposal was defended by Frito-Lay on the ground that it might go into the private label business sometime in the future (Tr. 151-152, 199; Clegg Depo., 46-47, 121-125, 161).

Frito-Lay's withdrawal from group bargaining. The Unions withdrew from their insistence upon uniform terms for compensation in an effort to avoid a strike, but insisted as a condition of flexibility in this respect that the three Employers agree upon an identical guaranteed percentage increase in annual wages.

The Unions' new position effected a breakthrough in the negotiations with Granny Goose, and a tentative settlement agreement was reached with this Employer, subject to membership ratification. The Unions then approached Frito-Lay and Scudder's with the Granny Goose settlement, stating that it represented a position the Unions' negotiating committee would recommend if agreement could be reached upon individual compensation provisions for each of the remaining Employers, along with the guaranteed increase provision. Neither Frito-Lay nor Scudder's was willing to accept the Unions' position. Accordingly, on May 11, 1974, the final proposals of each of the Employers was again submitted for approval or rejection by the Unions' membership employed by all three of the Employers. The Unions' negotiating committee did not recommend any of the proposals, and all were rejected (Tr. 306-307).

C. The strike and its settlement.

On May 12, 1974 the Unions struck each of the Employers. Bargaining continued with the Employers separately, as it had been conducted prior to the strike. On June 3, 1974, the Unions were directed by an official of the Western Conference of Teamsters, a Teamster organization which has supervisory authority over Teamster Locals in respect to some matters, to conduct future ratification votes on an Employer-by-Employer basis, rather than on a group basis. Thereafter, on June 6, 1974 the Unions submitted to their

membership employed by Granny Goose a new proposed agreement which had been made by that Employer after the strike began, and it was approved. This was followed on June 7 by a vote of the Frito-Lay employees only upon the most recent proposal of their Employer, but it was rejected.

The strike continued against Frito-Lay until June 29, 1974. On that date a further proposal made by Frito-Lay was submitted to its employees, and was approved. The Frito-Lay contract contained different provisions in many respects, particularly as to the compensation structure, than did either of the contracts which were eventually executed by the other two Employers.

D. The Decision of the District Court.

The trial before the District Court was bifurcated. Following trial on the issue of liability, the Court entered Findings of Fact and Conclusions of Law (Appendix C), but did not write an opinion. An earlier Memorandum of Opinion was issued by the District Court in denying the Unions' motion to dismiss the amended complaint (Appendix B). The Memorandum is of special importance in disclosing the Court's views on the merits of the case. When it appeared early on that the underlying facts were largely undisputed, and that the parties wished a legal ruling on the merits of the issues which would perhaps avoid a trial, the Court suggested that the complaint be amended to allege evidentiary matters, and that the Unions file a motion to dismiss (Appendix, p. 23 fn. 1). The Memorandum of Opinion thus reflects the District Court's ruling upon a pleading which was expanded to allege substantially all of the material facts subsequently relied on by the Court in making its decision.

The legal question which the District Court found to be presented in this case is "whether Section 8(b)(4)(A) prohibits only strikes whose object is to force an employer to join an employer organization or whether it also prohibits a strike whose object has the practical effect of forcing all companies in an industry to accept one identical contract even though there is no formal employer organization" (Appendix, p. 27). The Court answered this question in favor of the latter alternative, holding that a strike is prohibited by Section 8(b)(4)(A) where "an object thereof is to force several employers to act in effect as if they belonged to . . . an employer organization," even though the striking union does not insist upon the formation of a formal employer organization (*id.*, p. 33).

Turning to the evidence, the Court initially expressed uncertainty as to whether it was necessary in proving a violation of Section 8(b)(4)(A) to show that the striking union entertained the intent proscribed by that provision, or whether it was sufficient to show that the activities of the striking union had the necessary effect of compelling employers to bargain "as if they belonged to a formal employer organization" (*id.*, p. 34). On either premise, however, the Court found that the allegations of the amended complaint were sufficient to avoid dismissal. The factors relied on by the Court in this respect are the following: (1) the Unions' insistence upon a single contract covering all Employers, or separate contracts containing uniform provisions, (2) the Unions' acceptance of Frito-Lay's proposals conditional upon agreement of the other two Employers, (3) the Unions' ratification procedure, under which employees of all three Employers voted on the proposals of each of the Employers, and (4) the Unions' proposals to

Frito-Lay which were inapplicable to its operations, but were applicable to the operations of the other Employers (*id.*, pp. 34-35).

The Court's Findings of Fact and Conclusions of Law (Appendix C) entered after trial on the issue of liability are consistent with its earlier Memorandum of Opinion. Two of the findings expressly deal with the object of the strike, as viewed by the Court. Finding No. 26 states that "The object of the strike was to force or require the three companies to accept one contract covering employees of all three companies or to accept three separate uniform contracts containing identical provisions for each company." (Appendix, p. 44). Finding No. 29 states in relevant part that "the object of the strike was to force or require Frito-Lay to bargain and act as if it belonged to an employer organization" (*id.*, p. 45).

After a second trial was conducted on the question of damages, the District Court entered brief Findings of Fact and Conclusions of law, without an opinion, fixing damages in the amount of $688,518.00 (Appendix D). The judgment awards this sum in damages against the Unions jointly and severally (Appendix E).

E. The Decision of the Court of Appeals.

The court below affirmed the District Court's judgment on liability, but ruled that damages should not have been assessed with respect to the period of the strike following June 7, 1974 (Appendix, p. 17). The limitation on the period to which damages were applicable was based upon the Unions' conclusion of a separate agreement with Granny Goose on June 6, 1974, which in the Court's view reflected an "abandonment of the unlawful objective and a retreat to the lawful objective of obtaining, in a separate contract,

terms as close to those of the Granny Goose contract as bargaining and the strike could compel Frito-Lay to accept" (*ibid.*).[6] The case was remanded to the District Court "for reconsideration of the award of damages" in the light of the rulings of the court below (*id.*, p. 22).

On the merits of the liability issue, the court below agreed with the District Court that it is not necessary to show that a union's object is to force "an employer to become an actual member of an existing employer association" in order to prove a violation of Section (b)(4)(A) (Appendix, p. 7). That provision of the Act, according to the court below, proscribes "coercive union conduct with the object of forcing employers to engage in multi-employer bargaining, whether as a formal association or informal group" (*id.*, p. 8).

Addressing the question of whether the record in the present case supports a finding that an object of the strike against Frito-Lay was to force it into "multi-employer bargaining," the court below acknowledged that, as a matter of general principle, "uniformity of labor standards is a legitimate union goal" (Appendix, p. 8). Indeed, the Court of Appeal's opinion states that the various techniques by which the Unions in the present case sought to achieve uniformity in the contracts of the three Employers—including "group voting, insistence on parallel contract terms for the same or commensurate job classifications, and conditional acceptance of contract proposals"—are "not in themselves . . . illegitimate labor tactics" (*id.*, p. 9). The critical question, according to the Court, calls for an "inquiry into

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6. The court below also found that the District Court should not have included in the damage award certain expenses which Frito-Lay claimed to be attributable to the strike (Appendix, pp. 20-21).

the Union's motives and objects" (*id.*, p. 10). Reading the decision of the District Court to include a "finding of illegal motive" (*ibid.*), the Court of Appeals concluded that this finding should be sustained. The opinion alludes to several facts which "taint . . . the more ambiguous activities of group voting, demands for inapplicable and uniform conditions, and conditional acceptance of contract provisions" (*id.*, p. 12), and demonstrate that these practices, although not sufficient in themselves to support an inference of illegality, were not designed simply to attain contractual uniformity, but rather to compel multi-employer bargaining. These facts include (1) the disappointment of the Unions' membership that the multi-employer group had dissolved, (2) the Unions' negotiating committee's preference for continuing multi-employer bargaining, (3) occasional suggestions by the negotiating committee that the Employers "'get together' to come up with common contracts," (4) the arrangements made by the Unions' negotiating committee at various times for meetings to take place at the same time in the same location, and (5) a statement by a member of the negotiating committee in his pre-trial deposition that part of the strategy of the negotiating committee was to persuade the Employers to bargain as a group (pp. 10-13). In addition, the Court's opinion stresses the fact that there had been multi-employer bargaining for fourteen years, which had continuously provided the Unions with "absolute uniformity of wage rates and working conditions" (*id.*, p. 12).

Finally, the court below rejected the Unions' contention that their expressed willingness on and after May 1, 1974, to bargain for separate compensation systems constituted an abandonment before the strike of any prior efforts to achieve common bargaining with the Employers. The opin-

ion states that the Unions' concession "was so grudging as to permit a conclusion that it was not genuine," and notes that the Unions persisted thereafter in their group voting tactics and in demanding "the inclusion of provisions that were inapplicable to some employers" (Appendix, p. 14).

The Court also rejected the Unions' contention that Frito-Lay had failed to prove that its losses attributable to the strike were the consequence of the illegal object found by the District Court, as differentiated from the lawful objective of improving the wages and working conditions of the employees. Recognizing that the economic objectives of the strike were not proscribed by law, the Court of Appeals concluded that the damage award, which included all strike losses sustained by Frito-Lay, should be sustained because the illegal objective was "at least a substantial—if not the sole—cause of the strike" (Appendix, p. 16).

REASONS FOR GRANTING THE PETITION

This case is the first occasion that Section 8(b)(4)(A), or indeed any other provision of the Act, has been invoked to challenge the lawfulness of union efforts to use economic force to attain uniform contractual provisions with competing employers whose employees they separately represent. The devastating effect which the decision below, in sustaining that challenge, has on established collective bargaining practices cannot be overstated. We show initially, however, that the decision of the Court of Appeals has the meaning we ascribe to it. It is true that the opinion acknowledges that union tactics such as those used in this case to achieve contractual uniformity with competing employers are not "in themselves . . . illegitimate" (Appendix, p. 9). But it is also true that the Court of Appeals has relied

upon precisely the same tactics to support a finding that the Unions subjectively intended to force multi-employer bargaining upon the struck Employer. In the final analysis, as we show, the decision stands for the proposition that a strike to secure common terms and conditions of employment for employees of competing employers may be made the basis for a finding that the striking union has violated Section 8(b)(4)(A) of the Act. This ruling is both wrong and potentially destructive of traditional practices in collective bargaining. It should be reversed.

1. At the outset, it should be made clear that the Unions have not urged, contrary to the assertion in the opinion below (Appendix, p. 5), that the scope of Section 8(b)(4)(A) is limited to coercive acts for the object of compelling "an employer to become an actual member of an existing employer association" (*ibid.*). We accept, at least for purposes of this case, that the proscribed object comprehends efforts "to force employers to engage in multi-employer bargaining" (*id.*, p. 8), if that is taken to mean insistence that employers join in common bargaining, speak through joint representatives, and attempt to resolve differences with the bargaining agent of their employees on a group basis. The question before this Court is *not* whether additional formality in such an arrangement is necessary to establish an "employer organization" to bring a strike within the pale of Section 8(b)(4)(A).

There is a critical difference, however, between forcing competing employers to accept common terms and conditions of employment for their employees and forcing multi-employer bargaining. There are words in the opinion below which recognize that difference. The Court of Appeals states not only that "uniformity of labor standards is a

legitimate union goal" (Appendix, p. 8), but that the tactics which the Unions pursued in this case to achieve uniformity "have been sanctioned in other contexts as devices by which to achieve that goal" (*ibid.*). The court below further reasons, however, that the controlling question under Section 8(b)(4)(A) is the subjective motivation of the striking union, and in that framework finds it permissible to rely on the tactics through which the Unions sought uniformity of contract provisions to infer that the Unions were motivated by their desire to reinstitute multi-employer bargaining. If lawful practices may thus be made the basis for an inference of illegality, they have no protective value under the law.

It is true that the court below refers to evidence beyond the Unions' practices to achieve uniformity in concluding that the actual intent of the Unions was to reconstitute group bargaining. A brief analysis of this additional "direct evidence of union intent," however, shows that it comes to nothing (Appendix, p. 12). Thus, the court below cites the history of multi-bargaining, the disappointment of the Unions' membership over the dissolution of the Employers' organization, and suggestions from Union negotiators that the employers "'get together'" to come up with common contracts" (pp. 10-12, p. 9). If these factors are substantial evidence of an effort to force multi-employer bargaining, it is difficult to perceive a case where uniformity of demands does not automatically become an illegal objective. It is to be presumed that in most, if not every situation where unions seek uniform contract provisions they would prefer to bargain with a single spokesperson for all of the employers. But group bargaining requires mutual consent. See, *e.g., Custom Colors Contractors,* 226 NLRB 851, 852 (1976).

In its absence unions must be free to make common contract demands even though they may be disappointed with the employers' refusal to join together for negotiations, and even though they may suggest advantages from common employer proposals.

The final item of "direct evidence" of illegal motivation which is cited in the opinion below is the pre-trial deposition testimony of one of the members of the Unions' negotiating committee which the Court describes as showing that "part of the Union's strategy was to persuade the companies to reinstitute the old employer organization, and that the tactics in question were designed to accomplish that goal" (Appendix, pp. 11-12). The testimony described, however, relates to the initial January 28, 1974 meeting at which time the Unions attempted to persuade the three Employers that joint meetings should be conducted.[7] During the course of that meeting each of the three Employers made it clear that it had no intention of bargaining in joint meetings, and except to the extent that the Employers hereafter consented to meet together contract proposals were discussed in separate meetings with each Employer. Although the deponent was asked about the Union's strategy in subsequent meetings with the various Employers, there is no testimony by him relating to a continuing effort

7. The opinion below quotes the testimony relied on in footnote 9 (Appendix, p. 12). We attach to this Petition as Appendix H three pages of the deposition testimony in question to show the context in which the quoted excerpt appears. These pages make clear that the deponent was referring to the strategy of the negotiating committee formulated prior to and pursued only during the initial meeting.

on the part of the Unions to persuade the Employers to bargain jointly subsequent to the January 2 meeting.[8]

The District Court did not refer to any of the so-called "direct evidence" of illegal motivation which is cited in the opinion below. In its view, the tactics used by the Unions to secure uniform contract provisions were tantamount to an unlawful object. The additional evidence cited in the opinion below reflects no more than an afterglow of fourteen years of multi-employer bargaining which dissipated with the realization by the Unions that separate bargaining had become necessary. The only meaningful evidence in this case relating to the Unions' objectives during the period of substantive bargaining and prior to May 1 is that they sought uniformity of contractual terms and conditions of employment. If that objective is legally protected, it cannot be given a different significance by the fact that the Employers had terminated a long term multi-employer arrangement, or by impulsive remarks of union negotiators that grow out of the memory of that arrangement.

In sum, the decision below can be explained only on the ground that the Court of Appeals has sanctioned the use of strike tactics to achieve uniform contract provisions among competing employers as a basis for finding the existence of the illegal object of forcing employers to engage in multi-employer bargaining.

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8. We also note that the court below describes the testimony in question as showing that the Unions sought "to reinstitute the old employer organization" (Appendix, p. 11). A fair reading of the opinions both of the District Court and the Court of Appeals, however, discloses that neither found that this was the object of the Unions. Rather, the District Court found that the Unions' object was to force Frito-Lay "to act in effect as if [it] belonged to . . . an employer organization" (Appendix, p. 33); and the Court of Appeals ruled that the Unions attempted to force Frito-Lay into "multi-employer bargaining" which the Court ruled to be a process that did not require membership in a formal organization. (Appendix, p. 7).

2. By equating multi-employer bargaining with seeking uniform terms and conditions of employment, the court below has committed serious error. The forbidden "object" which Section 8(b)(4)(A) encompasses cannot include conduct which is otherwise legitimate and protected by the Act. This approach to the interpretation of Section 8(B)(4) has long been adopted in (b)(4)(B) cases, which involve the distinction between protected primary and unlawful secondary union activity. Thus, it is established law that the exercise of the right to engage in primary picketing does not permit a finding of an unlawful object under Section 8(b)(4)(B) simply because "[t]he objectives of any picketing include a desire to influence others from withholding from the employer their services or trade." *Electrical Workers Local 761 v. N.L.R.B.*, 366 U.S. 667, 673 (1961). To infer an illegal intent from such activity would destroy the protection given to that activity. Manifestly, the same construction must be given to the same term "object" in the context of a Section 8(b)(4)(A) case. If the pursuit of common contract provisions is lawful, as the court below appears to concede, such lawful activity cannot properly be used to find an illegal object on the devious reasoning that it may furnish the basis for an inference that the bargaining is unlawfully motivated.

The distinction between bargaining for uniform contractual provisions and bargaining to modify the unit structure which is involved in this case has been recognized in a number of decisions arising under the good faith bargaining requirements of the Act—Sections 8(a)(5) and 8(b)(3). Under those provisions insistence that an existing bargaining unit be expanded to include other units may be prohibited. *International Longshoremen's Association (New York Shipping Association, Inc.)*, 118 NLRB 1481 (1957);

Douds v. Longshoremen, 147 F. Supp. 103 (S.D.N.Y., 1956). The law recognizes the difference, however, between bargaining for such a purpose and bargaining separately within several units to achieve uniform terms and conditions for the employees of all units. See *Joint Negotiating Committee v. NLRB*, 459 F.2d 374 (C.A.3, 1972), modified at 470 F.2d 722 (C.A.3, 1972); *Minnesota Mining and Manufacturing Company*, 173 NLRB 275, aff'd, 415 F.2d 174 (C.A.8, 1969). Similarly, coalition or coordinated bargaining, which involves the participation of union representatives from more than one bargaining unit in order to achieve the advantages of negotiations in one unit for other units, has long been recognized as a valid practice. *General Electric Co. v. N.L.R.B.*, 412 F.2d 512 (C.A.2, 1969). Although there is an obvious impact in this process on all of the bargaining units affected, it has not been held the equivalent of an improper effort to obtain involuntary multi-employer bargaining.

It should also be noted that an employer who adopts a contract previously negotiated by other employers in group bargaining does not automatically thereby become a member of a multi-employer bargaining unit. *Colonial Cedar Co.*, 119 NLRB 1613 (1958); *West End Brewing Co.*, 107 NLRB 1542 (1954). Nor does a strike to compel an employer to sign such a contract necessarily violate Section 8(b)(1)(B) of the Act, which prohibits unions from coercing "an employer in the selection of his representatives for the purposes of collective bargaining . . ." But *cf.*, *Metropolitan District Council of Carpenters (McCloskey & Co.)*, 137 NLRB 1583 (1962). The Act generally recognizes the right of a union to pursue the best bargain it can for the employees it represents, and to utilize the advantages ob-

tained in other negotiations to that end. The decision below is wholly inconsistent with this principle.

Finally, the legislative history of Section 8(b)(4)(A), although not very helpful in explaining the Congressional purpose, cannot be read as intended to infringe upon union practices aimed at winning uniform terms and conditions of employment through the kind of bargaining that occurred in this case. This provision was introduced into the Act by the House-Senate Conference Committee, which explained in its Report only that it was "a matter which was covered by Section 12 of the House bill, namely, concerted activity by a union or its agents to compel an employer or self-employed person to become a member." House Conference Report No. 510, 80th Cong., 1st Sess., pp. 44-45 (1947). Although this terse statement may well be ambiguous, as observed by the District Court (Appendix, p. 29), the extensive prohibitions contained in Section 12 of the House bill against industry wide bargaining and strikes were fully debated and criticized. See, *e.g.*, 93 Cong. Rec., part 3, pp. 3441-3442; 3520-3521 (1947). Those restrictive proposals were defeated, and the protection which the Act has always given to industry wide bargaining was preserved. See *N.L.R.B. v. Truck Drivers Local 419*, 353 U.S. 87 (1957). This history gives no support to an interpretation of Section 8(b)(4)(A) which would prohibit a union from seeking common contract terms in separate bargaining among competing employers.

3. The primary question which is presented by this Petition is of vital importance in the practice of collective bargaining, and should be decided by this Court. Since the origins of the American labor movement unions have openly struggled to achieve uniformity of wages and conditions of employment among employers within a competi-

tive industry. Long ago Chief Justice Taft, speaking for this Court, stated in *American Steel Foundaries v. Tri-City Central Trades Council,* 257 U.S. 184, 209:

> "To render this combination [unionization] at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade united because in the competition between employers they are bound to be affected by the standard of wages of their trade."

This Court has more recently reiterated the principles that a union, having once obtained agreement may without violating the law and "in pursuance of its own union interests seek to obtain the same terms from other employers." *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

In the present case the Unions were seeking, as this Court put it in *Pennington, supra,* "the elimination of competition based on wages among the employers." This is garden variety negotiating strategy which is practiced universally by unions in comparable circumstances. If bargaining tactics to achieve these traditional and legitimate ends are to become the basis for an inference of illegal motivation, the repercussion on countless bargaining relationships is too plain to require further discussion.

It is true, of course, that the approach of the court below to this problem calls for the drawing of an inference as a prerequisite to finding a violation of law, and that different inferences may be drawn by different tribunals on different sets of facts. As we have shown, however, it is legal error to permit an inference of illegality to be reached upon the basis of union attempts to secure uniformity. In view of the pervasiveness of bargaining of the kind the Unions practiced in this case, and in view of the protection the law gives to such bargaining, the decision below creates too

great a risk that lawful bargaining practices will be found invalid, and that sustantial awards of damages such as that in this case will be issued, to permit that decision to stand.

The National Labor Relations Board itself has not suggested in any of its decisions since Section 8(b)(4)(A) was adopted in 1947 that this provision was to have the reach given to it by the Court of Appeals in this case. Indeed, there are only four Labor Board decisions reported under this Section of the Act.[9] These decisions are not helpful in the instant case because they involve coercive efforts to compel employers to join identifiable employer organizations. We know of no court decision which ascribes illegality to union efforts to obtain uniform contract provisions among competing employers. The decision below thus constitutes a serious departure from generally accepted legal principles governing collective bargaining, and should be reversed.

4. Petitioners request the Court to review two additional questions in this case if the writ of certiorari is granted. Neither question need be reached if, as Petitioners contend, the decision below is reversed for the reasons already stated. If there is a different result, however, it is appropriate to review the remaining questions in order to make a proper disposition of the case.

a) On May 1, 1974, some twelve days before the strike, the Unions notified the Employers that they were abandoning their insistence upon uniform compensation provisions for all three Employers, and that they would consider the separate proposal of each Employer. This change in union

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9. *United Mine Workers, Local 1854 (Amax Coal Co.)*, 238 NLRB No. 214 (Sept. 29, 1978); *Glass Workers Local 1892 (Frank J. Rooney, Inc.)*, 141 NLRB 106 (1963); *I.L.W.U. Local 8 (General Ore, Inc.)*, 126 NLRB 172 (1960); and *United Construction Workers (Kanawha Coal Operators Association)*, 94 NLRB 1731 (1951).

position paved the way for a tentative settlement between the Unions and Granny Goose on May 3, 1974. The court below rejected the Unions' contention that the subsequent strike could not be found to have an object of achieving uniform contractual provisions in the light of the changed union position. The stated reason in Court of Appeals' opinion is that the new bargaining position was adopted grudgingly, and could be found not to be genuine (Appendix, p. 14). In addition the Court of Appeals pointed out that the Union persisted thereafter in calling for group voting on Employer proposals, and in demanding that the Employers accept contract provisions which were inapplicable to their respective work forces (*ibid.*).

The reasons given by the Court of Appeals are completely unpersuasive. The genuineness of the Unions' change of position is demonstrated by the subsequent bargaining which occurred for separate compensation arrangements among the Employers, ultimately resulting in different contractual provisions for each. The continued use by the Unions of group voting and their insistence upon proposals which had no current application to one or more of the Employers were at most tactics designed to achieve uniformity in other areas of bargaining. The compensation issue was the most serious problem in negotiations, and explained Frito-Lay's withdrawal from the prior multi-employer unit. Abandonment of their position for uniformity on that subject is wholly inconsistent with the conclusion that the Unions were thereafter seeking multi-employer bargaining. Accordingly, the Unions are entitled to judgment irrespective of the resolution of the principal question presented in this case.

b) If, as found by both courts below, the strike in this case had a proscribed object under Section 8(b)(4)(A)

of the Act, it also had the concurrent legitimate objective of winning improved wages and working conditions for the employees represented by the Unions. In circumstances where union activity has both licit and illicit aspects, the union may be assessed damages only for losses attributable to the illegal conduct. *United Mine Workers v. Gibbs,* 383 U.S. 715, 729 (1965); *Teamsters Local 20 v. Morton,* 377 U.S. 252, 261-262 (1964).

The Court of Appeals sustained a damage award in this case which included all of Frito-Lay's losses attributable to the strike for the period between May 12 and June 7, 1974. The District Court made no effort to take into account that one of the purposes of the strike was concededly lawful (although the question was raised), and the Court of Appeals affirmed the award because of its conclusion that the Unions' allegedly illegal object was "a substantial cause" of the strike (Appendix, p. 13).

This ruling is contrary to the principles established by this Court in the cases cited above, and should be reversed. The appropriate disposition of the case, if it turns on this issue, would be a remand to the District Court to recompute damages consistently with the rulings in *Gibbs,* and *Morton, supra.*

CONCLUSION

For all of the foregoing reasons it is respectively submitted that the Petition for Writ of Certiorari should be granted.

September, 1980

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Appendix "A"

The Opinion and Decision of the United States Court of Appeals for the Ninth Circuit is reprinted below.

United States Court of Appeals
For the Ninth Circuit

Filed
July 3, 1980
RICHARD H. DEANE
Clerk U.S. Court of Appeals

No. 77-2075

OPINION

FRITO-LAY, INC.,

Plaintiff-Appellee,

vs.

LOCAL UNION NO. 137,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and KENNEDY, Circuit Judges, and BONSAL,* District Judge

KENNEDY, Circuit Judge:

Frito-Lay, Inc., brought suit against fifteen local unions affiliated with the International Brotherhood of Teamsters,

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*Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

Chauffeurs, Warehousemen and Helpers of America (the "Union"), seeking monetary relief for damages suffered as a result of the Union's strike against the Company. Frito-Lay alleged the Union struck in violation of sections 8(b)(4)(A) and 303(a) of the Labor Management Relations Act ("Act"), 29 U.S.C. § 158(b)(4)(A) and § 187(a). The Union locals appeal from the district court judgment awarding Frito-Lay $688,518 in damages. Appellants challenge the trial court's interpretation of section 8(b)(4)(A) of the Act and the court's findings of fact relating to both liability and computation of damages.

This court has jurisdiction under 28 U.S.C. § 1291. For the reasons set out below, we affirm the findings as to liability, and we remand for further proceedings on the issue of damages.

I

Appellee Frito-Lay manufactures, sells and distributes potato chips, corn chips and other snack food products in California and elsewhere. Granny Goose, Inc. and Laura Scudder's are competitors engaged in the same business. Appellants are local labor organizations that represent route salesmen and warehousemen employed by Frito-Lay, Granny Goose, and Laura Scudder's in Northern and Central California and part of Nevada.

Between 1960 and December 14, 1973 the three employers joined together as an employer organization to bargain for and enter collective bargaining agreements with the Union. The employer organization negotiated on behalf of the employers for five successive collective bargaining agreements with the Union, covering the period between March 1, 1960, and February 28, 1974. Before commencing negotiations for a contract to succeed the agreement set to expire on February 28, 1974, each of the three employers

gave timely notice to the Union of their intent to withdraw from multi-employer bargaining and to bargain separately, thereby dissolving the multi-employer bargaining unit.[1]

On January 28, 1974 a union negotiating committee met with Frito-Lay, Laura Scudder's, and Granny Goose and submitted a single contract proposal to all three companies. Throughout the subsequent negotiations the Union demanded that the three companies agree either to one contract covering employees of all three companies or to separate contracts containing substantially identical provisions for each company.

During the negotiations the Union conditioned its approval of Frito-Lay's proposals upon the acceptance of those proposals by the other two companies. On four occasions the Union submitted separate contract proposals from each company to the union members for ratification. The employees of all three companies voted together on each company's proposal ("group voting"), despite each company's repeated demands that its employees alone vote on their company's contract proposals.

The Union evidently was dissatisfied with the breakup of the employer organization and frustrated by the inability to negotiate a single contract or substantially identical contracts to cover all its members. Several times during the negotiations union representatives suggested that the employers confer together to work out contract provisions

1. Frito-Lay's decision to withdraw from the employer organization apparently was based on factors peculiar to its method of product distribution, which emphasized different methods of compensation to its salesmen from those used by the competition; it desired to emphasize commissions and to reduce base pay for its salesmen.

that would be substantially identical for all three companies.[2]

On May 12, 1974 the Union, unable to obtain sufficiently similar contract provisions through individual bargaining, commenced a strike against all three companies. On June 3, 1974 the Western Conference of Teamsters ordered the Union to stop using the group voting procedure and allow each company's employees to vote alone on their company's contract proposal. The strike remained in effect against Frito-Lay until June 29, 1974, when Frito-Lay's employees, voting separately, ratified their company's contract proposal.

The district court concluded that the Union's conduct before and during the strike, together with statements of members of the union negotiating committee, evidenced an intent to force the companies to reconstitute the employer organization and to negotiate a multi-employer contract. The court held that the Union had committed an unfair labor practice in violation of section 8(b)(4)(A) because it struck the employers to achieve this goal.

II

Liability

Section 8(b)(4)(A) provides *inter alia* that it shall be an "unfair labor practice for a labor organization or its agents

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2. At the outset, the union negotiating committee requested that the three companies meet together with it on January 28, 1974, for the purpose of beginning negotiations. Each company insisting on its right to negotiate separately and independently, agreed to attend the meeting only to receive Union's initial contract proposal. During that meeting, the Union negotiating committee requested that the three companies attend joint bargaining sessions with the Union, as had been the practice before the dissolution of the employer organization. The companies refused. Nevertheless, at various times during the negotiations, the negotiating committee arranged joint meetings with the three companies in an effort to negotiate identical contract language. Several times the union negotiators expressed the "[w]ish [that] all you companies would get off your butts and get together," to come up with uniform language.

to engage in, or to induce or encourage any individual or any person engaged in commerce or any industry affecting commerce to engage in, a strike where an object thereof is to force or require any employer to join any employer organization." 29 U.S.C. § 158(b)(4)(A).[3]

At the outset, we must determine the scope of the prohibition in section 8(b)(4)(A). Appellants argue the section proscribes cocercive union conduct—here a strike—when it is directed at forcing an employer to become an actual member of an existing employer association. It follows, the Union contends, that the section does not prohibit union action taken to require employers to bargain on a group basis. We disagree with the Union's limited construction of the provision.

No NLRB decision we have found reaches the boundaries of the section, as in each case where a violation of section 8(b)(4)(A) was found the Union had struck to require an employer to join an existing employer organization. *See United Mine Workers, Local 1854 (Amax Coal Co.)*, 238 NLRB No. 214 (Sept. 29, 1978); *Glass Workers Local 1892 (Frank J. Rooney, Inc.)*, 141 NLRB 106 (1963); *I.L.W.U. Local 8 (General Ore., Inc.)*, 126 NLRB 172 (1960); *United Construction Workers (Kanawha Coal Operators Association)*, 94 NLRB 1731 (1951). Although these cases all involve existing employer organizations, however, they do not emphasize formal membership in an existing organiza-

3. Section 303(b) of the Act, 29 U.S.C. § 187(b), provides that whoever shall be injured in his business or property by reason of any violation of Section 303(a) may sue in any district court and shall recover damages sustained and the costs of the suit. Section 303(a), 29 U.S.C. § 187(a), provides that it shall be unlawful for the purposes of Section 303 only, in any industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in, among others, section 8(b)(4)(A).

tion as a necessary component of a section 8(b)(4)(A) violation. In *Amax Coal Co.,* for example, the president of the UMW proposed that twelve western coal mine operators form a multi-employer bargaining association to negotiate a single agreement covering their miners. Four operators agreed to the plan. One operator who rejected the proposal subsequently sued the UMW, charging violations of sections 8(b)(1)(B) and 8(b)(4)(A). The Board ignored a possible distinction between existing and nascent employer organizations and concluded only that the Union had violated section 8(b)(4)(A) by striking the dissident operator, "with the objective of forcing it to engage in multiemployer bargaining. . . ." *Id.* at 15.

There is nothing talismanic about the term "employer organization." Neither the Board nor the courts have ever required that employers organize themselves into a formal association to be considered an employer organization for purposes of the Act. On the contrary, "substance rather than legalistic form is all the Board has ever required in multi-employer bargaining." *Town & Country Dairy,* 136 NLRB 517, 523 (1962). *Accord Metz Brewing Co.,* 98 NLRB 1010, 1012 (1957). To form a multi-employer group, individual employers need only express an unequivocal intention to be bound in collective bargaining by group rather than individual action. *Komatz Construction Co. v. NLRB,* 458 F.2d 317, 321 (8th Cir. 1972). No formal organizational structure is required. Recognizing the potential informality of multi-employer bargaining units, we think it unlikely that Congress sought in section 8(b)(4)(A) to prohibit a union from forcing an employer to become a formal member of an employer organization but to permit a union to force competing employers to bargain together as an informal group. Attributing that interpretation to

the section would allow a union to force employers to engage in multi-employer bargaining so long as the Union did not make the mistake of requiring the employers involved to become members of a formal, existing employer organization.

Our reading of section 8(b)(4)(A) is supported by the legislative history of the Labor Management Relations Act, which indicates that Congress was concerned with forced multi-employer bargaining in general, not merely forced membership in an existing organization. As the district court aptly pointed out, *Frito-Lay, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 401 F. Supp. 370, 373-76 (N.D.Cal. 1975), the proscription of section 8(b)(4)(A) originally encompassed all industry-wide bargaining. The bill, H.R. 3020, was amended later in a compromise measure to ban only involuntary industry-wide bargaining. But throughout the debates the focus was on industry-wide employer bargaining in general—and its perceived evils, such as crippling industry-wide strikes, collusive stifling of competition, and "shocking restraints of trade," House Report No. 245, *Legislative History of the Labor Management Relations Act, 1947,* 93d Cong., 2d Sess., p. 591—rather than on the operation of formal employer organizations.[4]

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4. The Union suggests that, because it never made an express demand that the employers bargain as a multi-employer group, therefore cannot be held to have violated § 8(b)(4)(A). The logic of this argument eludes us. Suffice it to say that an express demand to join in multi-employer bargaining has never been considered a necessary component of a section 8(b)(4)(A) violation. As the Board stated in *General Ore.* 121 N.L.R.B. 173, "It does not matter that their objectives were not formulated by the Respondents as a demand. The parties well understood what alternative action was expected of the Company as a condition of the cessation of the picketing, without the necessity of formulating the specific demand."

The tactics of the union, its demand for uniform contracts, its suggestions of joint meetings with the three companies, and the context of the prior bargaining history are all strong evidence of the Union's objective.

In view of the legislative history, we conclude that section 8(b)(4)(A) must be construed to prohibit coercive union conduct with the object of forcing employers to engage in multi-employer bargaining, whether as a formal association or informal group.

The Union next contends that the actions attributed to it during the negotiations constitute approved tactics in furtherance of its legitimate efforts to obtain uniform wages and working conditions. We agree that uniformity of labor standards is a legitimate union goal, *United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184 (1921); *Utility Workers of America (Ohio Power Company),* 203 NLRB No. 55, 83 LRRM 1099 (1973), *enf'd.,* 409 F.2d 1383 (6th Cir. 1974), and that variations of the tactics employed by the Union have been sanctioned in other contexts as devices by which to achieve that goal. Specifically, courts in coalition bargaining cases have upheld group voting among the employees in separate units where the working conditions negotiated in one unit may substantially affect the working conditions of the other units.[5] Similarly, we can concede for the purposes of this case that a union legitimately may demand contract coverage of jobs not currently in existence if those jobs may at a future date exist and be within the bargaining unit. *See International Typographical Union, Local 38 v. NLRB,* 278 F.2d 6, 11 (1st Cir. 1960) *aff'd in part and rev'd in part,* 365 U.S. 705 (1961). We think also that the Union's practice of presenting one company with concessions agreed to by another company—and accepting one company's

5. It is plausible that employees in this snack food industry would be affected by a contract settlement with any individual company, and all would have an interest in voting on each proposal.

proposal subject to its acceptance by the other companies —may be said to fit within a broad definition of "whipsawing,"[6] an accepted labor tactic designed to achieve uniform economic terms and conditions. *Cf. NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply Co.)*, 353 U.S. 87 (1957); *NLRB v. Hunt*, 183 NLRB No. 100, *enf'd.*, 463 F.2d 215 (9th Cir. 1971); *NLRB v. EZ Davies Chevrolet*, 395 F.2d 191 (9th Cir. 1968).

Although the cases cited to us as support for these propositions are distinguishable on their facts from the present dispute, taken together they confirm the general proposition that the tactics described are acceptable collective bargaining techniques when the Union employs them to achieve a legitimate goal, such as uniformity in working conditions. Thus, group voting, insistence on parallel contract terms for the same or commensurate job classifications, and conditional acceptance of contract proposals do not in themselves constitute illegitimate labor tactics.

Tactics such as those described above, however, although innocent in and of themselves, can in context become part of an illegal overall pattern of conduct. Assertions of a goal of uniformity in instances such as this may mask illegitimate union motives. *Utility Workers, supra*, 83 LRRM at 1103; *NLRB v. General Electric Co.*, 418 F.2d 736, 760 n.15 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970); *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 506 (1960). There is a violation of section 8(b) (4) (A) if, on the basis of all the evidence, the court determines that

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6. A "whipsaw strike," by common understanding is a strike against only one member of a multi-employer bargaining unit in an attempt by the use of economic pressure to force that member and each subsequent member to come to an agreement separately. *National Labor Relations Board v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 90 n.7 (1957).

a substantial purpose of the union is to force the companies into a multi-employer bargaining unit and the otherwise lawful tactics are being employed in support of that purpose. Although inquiry into the Union's motives and objects is made difficult by problems of proof, the inquiry is a commonplace component in the adjudication of labor disputes. The same problems of proof exist in the context of union picketing, *see, e.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 386-90 (1969); *Electrical Workers, Local 761 v. NLRB*, 366 U.S. 667, 673-74 (1961); *Carpenters Local 470 v. NLRB*, 564 F.2d 1360, 1362 (9th Cir. 1977), refusals to bargain in good faith, *see NLRB v. Katz*, 369 U.S. 736, 738 (1962); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 821 (9th Cir. 1978); *cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (objective criteria preferable to inquiry into employer's subjective state of mind at time of employer's refusal to recognize a union)), and employer discharge of union employees; *see NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *NLRB v. Mrak Coal Co.*, 322 F.2d 311, 313 (9th Cir. 1963); *NLRB v. Cascade Empire Ass'n Inc.*, 396 F.2d 42 (9th Cir. 1961).

Upon review of the record made at trial, we conclude there is substantial, although not overwhelming, direct evidence to support the district court's finding of illegal motive and that its findings are not clearly erroneous. The record shows the Union's members were sorely disappointed by the breakup of the multi-employer group and that the Union trial to perpetuate past practices by negotiating a single contract for all companies or three

uniform contracts.[7] At several points during the negotiations the Union negotiators suggested that the employers "get together" to come up with common contracts, and went so far as to arrange joint bargaining meetings to be attended by all three employers simultaneously.[8] Finally, and most significantly, statements by union negotiators support the district court's finding that part of the Union's strategy was to persuade the companies to reinstitute the old employer organization, and that the tactics in question

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7. For example, during a pretrial deposition the following colloquy ensued between defense counsel and Ralph J. Torrisi, one of the Union's chief negotiators:

> "Q: As I understand what you said earlier, it was the sense of the membership that they preferred to keep things as they had been, that is, the industry would bargain as a whole and operate under the same provisions.
>
> "A: That's what they wanted. Yeah, they had a hell of a hill to climb and get over that.
>
> "Q: I think you also indicated that—related to that that the membership was deeply unhappy about the attempt to break up the multi-employer group?
>
> "A: They were deeply unhappy on being notified that it had been broken up.
>
> "Q: That's what I meant, yeah. I mean you were faced with a lot of unhappiness among your membership about that issue.
>
> "A: Yes."

This statement was corroborated by another union negotiator, Harry Marashian:

> "Q: Wasn't there some concern on the part of the Negotiating Committee over the break-up of the prior multi-employer group?
>
> "A: There was concern. They were concerned."

Marashian also stated:

> "A: Always been a multi-bargaining group in the past, so this is why we bargained multi-group. It's been past practice so far as I can recall.
>
> "Q: And the Negotiating Committee wanted to continue the past practice?
>
> "A: Yes, sir."

8. *See* note 2, *supra.*

were designed to accomplish that goal.[9] The intent inferable from this testimony taints the more ambiguous activities of group voting, demands for inapplicable and uniform conditions, and conditional acceptance of contract provisions.

The context and history of the negotiations here further support the district court's conclusion that the Union intended to force multi-employer bargaining. For fourteen years the Union had negotiated with the multi-employer group and signed collective bargaining agreements that the Union apparently found satisfactory. Through multi-employer bargaining the Union was able to achieve absolute uniformity of wage rates and working conditions. Multi-employer bargaining enabled the Union to know precisely the rates and conditions for each employer in the area. We conclude that a past history of successful multi-employer bargaining, coupled with direct evidence of union intent to continue bargaining on a multi-employer basis and resort to coercive tactics designed to emplement that intent, establish an overall pattern of conduct supporting the district court's finding of an illegal union objective to force multi-employer bargaining.

Appellants argue that the district court has improperly equated an unlawful object with a potential effect of the

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9. For example, Marashian admitted the following:

"Q: Wasn't it the desire of the Negotiating Committee that the multi-employer group remain in existence during these negotiations?

"A: Right.

"Q: And was part of the strategy of the Negotiating Committee to persuade the employers to re-form the multi-employer group to negotiate the new contract?

"A: As I recall, yes.

"Q: Was it also part of the strategy of the Negotiating Committee to use group voting in order to persuade the employers to re-form the multi-employer group?

"A: Yes, that was."

Union's negotiating strategy. We agree that where certain tactics are susceptible of innocent as well as illegal interpretation a court should hesitate to infer an illegal object based upon nothing more than mere conduct and its effects. In such cases we do not infer intent merely from the foreseeable effect of such tactics. *Cf. Electrical Workers, Local 761 v. NLRB,* 366 U.S. 667, 673-74 (1961) (picketing that induces secondary employees to respect a picket line held not the equivalent of picketing where the object is to induce those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer); *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612 (1967). The preceding discussion makes it clear, however, that the court did not rely solely on the effect of the Union's conduct to establish the illegitimate motive.

Appellants further assert that even if the Union had an illegal object during negotiations, it abandoned that object prior to the strike when it withdrew its demand for identical contract provisions among the three companies. The evidence, however, supports the district court's finding that the Union's illegal motive continued up to and during part of the strike.

On May 1, 1974 the Union advised the three employers that it would consider contract proposals with separate compensation systems tailored to the needs of each individual employer, provided that all companies would agree to an identical guaranteed percentage increase of annual wages. After reaching a settlement agreement with Granny Goose on May 3, the union negotiating committee presented the Granny Goose settlement agreement to Laura Scudder's and Frito-Lay on May 7 and 8, and insisted that Laura Scudder's and Frito-Lay accept it. When asked by company

negotiators whether it would recommend the Granny Goose proposal to the membership, the union negotiator stated that he would not recommend it unless he could obtain corresponding uniform contracts from the other employers.

Frito-Lay was told that it would have to agree to the Granny Goose settlement except in the area of wages, and even in the area of wages it would have to accept identical provisions regarding guaranteed increases. On May 10, two days before the strike, the union negotiator gave notice that language Frito-Lay proposed was not sufficiently uniform in light of the Granny Goose agreement and that a strike over common language appeared imminent. The strike commenced on May 12.

Appellants contend that because they were willing to allow the possibility of separate compensation systems in the week prior to the strike, there was no demand for a uniform contract and no requirement of multi-employer bargaining.

However, the Union did not submit the proposed Granny Goose agreement to its members for a vote, and its willingness to allow the possibility of separate compensation systems was so grudging as to permit a conclusion that it was not genuine. The Union persisted, moreover, in its tactics (1) of group voting (until ordered to desist by the Western Regional Conference of Teamsters), and (2) of demanding in all three contexts the inclusion of provisions that were inapplicable to some employers.

The evidence supports a finding that the Union's illegal purpose was a substantial cause of the strike. We think, however, that the improper purpose was abandoned on June 7, 1974, so that the Union's liability ceased after that day. We discuss this conclusion below.

III

Damages

Frito-Lay requested $559,500 in lost profits and $148,000 in extraordinary expenses. The district court awarded the company $554,154 in lost profits and $134,364 in extraordinary expenses. The parties contest four aspects of damages: (1) the period of time for which damages should be assessed—the entire duration of the strike or some shorter period; (2) the method that the court should adopt to estimate Frito-Lay's lost sales during the strike; (3) several elements Frito-Lay claimed as "fixed expenses," (recoverable as unavoidable losses) which the Union contends should properly be viewed as variable costs (not recoverable); and (4) certain expenses claimed as "extraordinary."

A. *Duration*

In *Mead v. Retail Clerks Local 839,* 523 F.2d 1371 (9th Cir. 1975), we held that "when a union exerts economic pressure to achieve both lawful and unlawful objectives and the consequences are not separable, damages cannot be recovered unless the unlawful objective was a substantial cause of the pressure." 523 F.2d at 1374. Appellants claim that the underlying object of the strike was lawful—to obtain increased economic benefits for its members—even though the attempt to force multi-employer bargaining was unlawful. They argue that to recover damages Frito-Lay must either (1) distinguish between the effects of the legal and illegal objectives, or (2) if those effects are not separable, establish that the strike would not have occurred absent the illegal objectives.

Mead does not require that the illegal object be the sole cause of the strike, only that it be a "substantial" cause or that it "materially contribute" to the injury, "notwithstanding other factors contributed also." 523 F.2d at 1376-

77. The Union's argument misapprehends the principles applicable to proof of causation in cases such as this. The controlling rules derive from tort law principles where more than one factor can be a substantial cause, and no single factor need to be sole causative element. Here the district court properly found the illegal objective to be at least a substantial—if not the sole—cause of the strike; from this the court could reasonably infer a causal relationship between the illegal objectives and the damages attributable to the strike.

A case may arise in which an illegal object gives such momentum to a strike that the effects of the wrongful conduct last beyond the time when the union renounces the illegal object and confines its demands to lawful purposes. There is a certain cadence to collective bargaining negotiations, both before a strike is called and while it continues. In the usual case, a strike occurs after a period of bargaining and after other, less coercive means of persuasion have failed. By then, an illegal demand may have become closely entwined with legitimate ones. A strike cannot, therefore, be viewed in isolation from the bargaining that surrounds it. If an illegal demand is a substantial cause of continuing the strike even beyond the point when the demand is renounced, we do not foreclose the possibility that a union may be held liable for the injuries so caused. A union may not escape liability for pursuing an illegal object by renouncing it if the effects of an illegal demand nevertheless continue. In the case before us, however, there was no explicit finding that the illegal object pursued by the union was a substantial cause of the strike's continuance after that object was abandoned. On this record, moreover, we think the evidence is clear that the union's liability for the strike terminated before the date the strike ended.

On June 6, 1974, the union accepted a separate contract with Granny Goose. This was by a separate vote of Granny Goose employees only. The Union had also offered to accept from Laura Scudder's a compensation scheme, based on high commissions on corn products, different from the Granny Goose contract and not acceptable to Frito-Lay. On June 7, the Frito-Lay employees, at a Union meeting, voted against a proposed Frito-Lay contract. After comparing with the Granny Goose contract, a negotiating committee had recommended that the Frito-Lay offer be turned down, and "that we match the Goose proposal, or at least ask." The recommendation was not unlawful, and it does not evidence a continuing demand that Frito-Lay join in multi-employer bargaining. All it shows is a demand for further bargaining securing the terms of the Granny Goose contract as an objective.

The events of June 6 and 7 show an abandonment of the unlawful objective and a retreat to the lawful objective of obtaining, in a separate contract, terms as close to those of the Granny Goose contract as bargaining and the strike could compel Frito-Lay to accept. The abandonment should have been apparent to the employer when it occurred, and it cannot be said that either side was any longer affected by the illegal object previously pursued by the union. We hold that the unlawful purpose of the strike was effectively abandoned on June 7, 1974, and that after June 7 the strike was lawful. The Union is not liable for damages caused by the strike after June 7.

B. *Calculation of Damages*

The parties agreed on the following approach in calculating Frito-Lay's lost profits: (1) estimation of lost sales; (2) computation of variable expenses as a percentage of total sales; and (3) deduction of the appropriate

amount of variable expenses not incurred from the sales not made.

Appellants still challenge the specific method used by the district court to compute Frito-Lay's lost sales, claiming that this method overstates those losses. This contention is without merit. In adopting the method proposed by Frito-Lay,[10] the district court estimated lost sales by comparing the prestrike sales volume in the division affected by the strike with the volume in other California divisions. It then arrived at a projected growth rate for the affected division and computed the value of lost sales. Appellants argue that this comparison is invalid because it ignores the asserted facts that growth rates are a function of sales volume and that growth rates diminish when sales within a division reach a certain level. Appellants suggest that Frito-Lay should have relied on its own market estimates of growth rate for the San Jose division determined by the Company long before the strike.

We begin with the proposition that once an employer has proved that he has suffered some injury to his business or property, "he need not detail the exact amount of damages suffered; it will suffice if the evidence shows the extent of damages as a matter of just and reasonable inference, although the result may be only approximate." *Gulf Coast Building and Supply Co. v. Electrical Workers, Local 480,* 428 F.2d 121, 125-26 (5th Cir. 1970); *see also, Story Parchment Co. v. Patterson Parchment Paper Co.,* 282 U.S. 555 (1931). As a corollary to this rule, we will not review on appeal the merits of various methods of calculation, so long as the method actually employed by the district court

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10. Although the district court did not specify the method by which it calculated damages, *Robey v. Sun Record Co.,* 242 F.2d 684 (5th Cir. 1957), *cert. denied,* 355 U.S. 816, it is evident that it adopted Frito-Lay's basic framework for calculating lost sales.

is designed to yield a reasonable approximation of damages. We are convinced that the method used in this case is reasonable. Particularly supportive of this conclusion is the observation that the three divisions being compared generally promote the same items at the same time and are similar to each other in other ways. The absolute sales volume figures were approximately the same during the four periods preceding the strike for the affected division and the other California divisions.

Appellants next contend that certain selling expenses designed by Frito-Lay as fixed (and therefore recoverable) are in fact variable costs that must be deducted from lost sales. They argue that bonuses paid to district sales managers should be designated as variable because they vary with sales volume. Similarly, they challenge salaries paid to secretaries and clerical workers whose workloads would have been substantially reduced by the strike, making employment of several individuals unnecessary during the strike. Rather than characterizing these costs as fixed or variable, we believe they are recoverable as justifiable expenses to minimize the damage caused by the strike. Payment of the bonuses was designed to retain experienced management personnel who would be likely to leave if their salaries were decreased because of the strike. Similarly, Frito-Lay acted reasonably in retaining members of the secretarial and clerical staff, since the company had no way of knowing when the strike would end. It reasonably maintained a standby posture for resuming full operations as soon as the strike halted, thus to minimize business losses. *See W. L. Mead, Inc. v. Teamsters, Local 25,* 129 F. Supp. 313 (D. Mass. 1955), *aff'd* 230 F.2d 576 (1st Cir. 1956).

Appellants also challenge the depreciation taken on certain Frito-Lay vehicles and production machinery. They

contend that in fact this equipment was not depreciating during the strike period because it remained idle. Frito-Lay calculated the amount of depreciation involved on the straight-line basis it uses for bookkeeping and tax purposes. We believe that even though the equipment was idle during the strike, some depreciation is allowable as a fixed expense. *See Huffman Towing, Inc., v. Mainstream Shipyard and Supply, Inc.*, 388 F. Supp. 1362 (N.D. Miss. 1975); *Noranda Aluminum, Inc. v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 382 F. Supp. 258 (E.D. Mo. 1973). We think, moreover, the straight-line method a reasonably accurate approximation of depreciation for these purposes.

We do agree with appellants that certain expenses claimed by Frito-Lay must be deducted from the lost sales figure. First, the record indicates that certain tractors and trailers for which Frito-Lay claimed depreciation during the strike were actually transferred to Los Angeles and used there for profit-making activities. Frito-Lay is not entitled to recover depreciation for any vehicles so employed because depreciation on that equipment is not an expense chargeable to the San Jose traffic center, but rather an expense chargeable to the Los Angeles center. Because the equipment was used in Los Angeles for profit-making activities, the company cannot claim this depreciation as a loss. *See, e.g., Buono Sales, Inc. v. Chrysler Motors Corp.*, 449 F.2d 715 (3d Cir. 1971). Second, Frito-Lay claimed as fixed the cost of replacement display and supply racks. Because the need for new racks varies directly with sales volume, we agree with appellants that these costs must properly be considered variable, and thus be deducted from lost sales. Finally, Frito-Lay treats as fixed several benefits it normally pays to employees, including sick pay, jury duty pay and leave of absence pay. Even though normally con-

sidered fixed, these expenses are similar to employee salaries—also considered fixed—which cannot be recovered because not paid during the strike.

The district court sitting as a trier of fact is not required to itemize the components that enter into an award of damages. *Neil v. Saga Shipping Co.*, 407 F.2d 481, 489 (5th Cir. 1969), *cert. denied*, 395 U.S. 986; *George v. United States*, 295 F.2d 310 (7th Cir. 1961); *Allen v. W.H.O. Alfalfa Mill Co.*, 272 F.2d 98 (10th Cir. 1959). Its failure to do so here, however, requires us to remand the case for reconsideration of its damage figure in light of our conclusions above.

Appellants also challenge other components of the district judge's finding regarding variable costs and extraordinary expenses. Without setting forth the items in detail, we have concluded, with the few exceptions noted above, that the findings of the district judge as to the amount of accrued and anticipated losses, lost profits, and extraordinary expenses suffered by Frito-Lay as a result of the strike were based upon substantial evidence and they cannot be held clearly erroneous under Fed. R. Civ. P. 52(a).[11]

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11. In addition to lost profits, an injured employer is entitled to recover the extraordinary expenses, not normal to its busines operation, incurred as a result of the Union's illegal strike. We note that such extraordinary expenses have been held to include the cost of extra guards hired as a result of picketing, *Flame Coal Co. v. United Mine Workers of America*, 303 F.2d 39, 46 (6th Cir. 1962), *cert. denied*, 371 U.S. 891; overtime pay necessitated to resume normal plant operations at the end of the strike, *Mason-Rust v. Laborer's International Union, Local 42*, 435 F.2d 939, 947 (8th Cir. 1970); *Sheet Metal Workers, Local 223 v. Atlas Sheet Metal Co.*, 384 F.2d 101, 109 (5th Cir. 1967); travel expenses and long distance telephone calls incurred in connection with attempting to end the strike, *Abbot v. Local 142, Journeyman & Apprentices of the Pipefitting Industry*, 429 F.2d 786, 790 (5th Cir. 1970); and extra freight expenses, *Vulcan Materials Co. v. United Steel Workers of America, AFL-CIO*, 316 F.Supp 509, 515 (N.D. Ala. 1969), *aff'd*, 430 F.2d 446 (5th Cir.); *International Union of Operating Engineers v. Dahlem Const. Co.*, 193 F.2d 470, 472 (6th Cir. 1951).

We affirm the district court's judgment of liability, but limit it to the period of the strike through June 7, 1974. We remand this action to the district court for reconsideration of the award of damages in the respects set forth above.

Appendix "B"

The Memorandum of Opinion of the United States District Court for the Northern District of California, dated and filed on September 15, 1975, denying Defendants' motion to dismiss the amended complaint is reprinted below.

ORIGINAL
FILED
SEP 15 1975
WILLIAM L. WHITTAKER
Clerk, U. S. Dist. Court
San Francisco

United States District Court
Northern District of California

No. C-74-1092-CBR

FRITO-LAY, INC.,
a Delaware corporation,

Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
etc., et al.,

Defendants.

MEMORANDUM OF OPINION

Plaintiff, Frito-Lay, Inc., brought this civil action pursuant to Section 303(b) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187(b), against fifteen local unions and two joint councils affiliated with the Interna-

tional Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America seeking monetary relief for all damages suffered by plaintiff as a consequence of defendants' alleged illegal strike against plaintiffs in violation of Section 8(b)(4)(A) of the LMRA, 29 U.S.C. § 158(b)(4)(A), and Section 303(a) of the LMRA, 29 U.S.C. § 187(a). Defendants filed a motion to dismiss plaintiff's second amended complaint pursuant to Rule 2(b)(6) of the Federal Rules of Civil Procedure on the ground that it failed to state a claim upon which relief could be granted.[1] For the purposes of this motion to dismiss, the Court accepts as true the facts alleged in the complaint.

Plaintiff manufactures, sells, and distributes potato chips, corn chips, and other snack food products in Northern California. Defendants are labor organizations who represent route salesmen and warehousemen of plaintiff in Northern California and a small part of Nevada. Defendants also represent route salesmen and warehousemen of Laura Scudder's ("Scudder's"), a snack food division of Pet, Inc., and Granny Goose Foods, Inc. ("Goose"), both of which

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1. Initially plaintiff moved "the Court to rule that, based upon the stipulation of facts entered into by the parties for the purpose of this motion, Defendants have engaged in activity and conduct constituting an unfair labor practice within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act." The stipulation provided that neither party in any way admitted any fact or conceded any contention. Except for the purpose of the Court's disposition of the Motion for Ruling on Preliminary Legal Issue, every action, event and fact set forth in the stipulation was subject to proof. Disposition of the motion would not have resulted in a dismissal of the complaint. At the hearing on this motion the Court informed the parties that any ruling on that motion would constitute an advisory opinion. Plaintiff then agreed to amend its first amended complaint to allege the stipulation of facts entered into by the parties for the purpose of the motion, and the parties agreed to treat the motion before the Court as a motion to dismiss. Subsequently, plaintiff filed a second amended complaint on May 19, 1975, reflecting the agreement of the parties at the hearing. On June 5, 1975, defendants formally filed a motion to dismiss the second amended complaint.

companies also manufacture, sell and distribute potato chips, corn chips, and other snack food products in California. Between 1960 and December 14, 1973, plaintiff, Scudder's, and Goose were members of an "employer organization" which was created and maintained for the purpose of bargaining for and entering into collective bargaining agreements with defendants. That employer organization negotiated five successive collective bargaining agreements with defendants on behalf of plaintiff, Scudder's, and Goose between March 1, 1960, and February 28, 1974. In a letter dated December 14, 1973, plaintiff notified defendants, Scudder's, and Goose that it was withdrawing from the employer organization and would thereafter bargain on its own behalf with defendants.[2] Similarly, on January 10, 1974, Goose notified plaintiff, Scudder's and defendants of its withdrawal from the employer organization. On January 28, 1974, a negotiating committee representing all of defendants submitted a contract proposal to plaintiff, Scudder's, and Goose which was contained in a single document applicable, without variation, to all three companies. Throughout the negotiations, defendants demanded that the three companies agree either to one contract covering employees of all three companies or to three separate uniform contracts containing identical provisions for each company. At no time did defendants offer proposals which were non-uniform for the three companies.

At various times defendants conditionally agreed to various proposals made by plaintiff, contingent upon the acceptance of such proposals by the other two companies. Defendants also insisted that plaintiff agree to contract provisions that were inapplicable to plaintiff's business

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2. Plaintiff's then current collective bargaining agreement was to expire on February 28, 1974.

operations, but applicable to the business operations of Goose and Scudder's. On four separate occasions between February and May of 1974, separate contract proposals of each company were submitted separately to all members of defendants. Each individual company's proposal was voted on by the employees of all three companies ("group voting"). On none of these occasions were employees allowed to vote alone on the proposal of their own company. Each company repeatedly demanded that its contract proposals be voted on for ratification by its employees only.

On May 12, 1974, defendants commenced a strike against all three companies. One object of that strike was to force or require the three companies to accept one contract covering employees of all three companies or to accept three separate uniform contracts containing identical provisions for each company. On June 3, 1974, the Western Conference of Teamsters ordered defendants to stop using the group voting procedure and allow each company's contract proposal to be voted upon by its own employees. Subsequently, defendants abandoned their insistence upon one contract covering all employees or three separate uniform contracts containing identical provisions. The strike remained in effect against plaintiff until June 29, 1974, when plaintiff's contract proposal was ratified by plaintiff's employees who were allowed to vote separately for ratification.

Section 303(b) of the LMRA provides that whoever shall be injured in his business or property by reason of any violation of Section 303(a) may sue therefor in any district court and shall recover the damages by him sustained and the cost of the suit. 29 U.S.C. § 187(b). Section 303(a) provides that it shall be unlawful for the purposes of Section 303 only, in any industry or activity affecting

commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 8(b)(4). 29 U.S.C. § 187(a). Finally, Section 8(b)(4)(A) provides *inter alia* that it shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce, a strike where an object thereof is to force or require any employer to join any employer organization.

Plaintiff contends that the above-described activity and conduct of defendants constituted an unfair labor practice within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act, and hence violated Section 303(a), thus entitling it to damages pursuant to Section 303(b), 29 U.S.C. § 187(b). More specifically, plaintiff contends that Section 8(b)(4)(A) prohibits unions from forcing competing employers to bargain on a multi-employer basis and that the conduct of defendants violated that prescription. Defendants argue that violation of Section 8(b)(4)(A) requires that the coercive conduct of the union (in this case a strike) be directed at requiring plaintiff to obtain actual membership in an employer organization. Because the Court agrees with plaintiff's argument, it denies defendants' motion.

The first issue before the Court is whether Section 8(b)(4)(A) prohibits only strikes whose object is to force an employer to join an employer organization or whether it also prohibits a strike whose object has the practical effect of forcing all companies in an industry to accept one identical contract even though there is no formal employer organization. Neither the wording of the statute nor the NLRB decisions construing it are particularly helpful in applying it to the factual situation present in the instant

case. None of the NLRB decisions reach the instant issue as in each of those cases the Board found that an object of the union's conduct was to force the employer to join an existing employer organization. See *Glass Workers Local 1892 (Frank J. Rooney, Inc.)*, 141 N.L.R.B. 106 (1963); *I.L.W.U. Local 8 (General Ore, Inc.)*, 126 N.L.R.B. 172 (1960); *United Construction Workers (Kanawha Coal Operators Association)*, 94 N.L.R.B. 1731 (1951). The Act does not define the term "employer organization". However, the parties concede that it is an organization which exists for the purpose of engaging in collective bargaining on behalf of its members. Hence, "forcing or requiring any employer * * * to join any * * * employer organization" could be construed quite broadly to cover both the situation where a union tried to force an employer to join an existing employer organization and the situation where the conduct of the union forced a group of employers to act in the same manner as if they were banded together into a formal employer organization (*i.e.*, a *de facto* employer organization). Thus, faced with little guidance from past decisions or the plain wording of the statute, the Court must look at the legislative history behind the statute in order to apply it to the facts in the instant case.

The language found in Section 8(b)(4)(A) was not present in either the House or Senate bills underlying the Labor Management Relations Act of 1947 but rather was inserted into the Act by the House-Senate conference committee. There is no clear indication in the legislative history why the language of the present Section 8(b)(4)(A) was included in the Act. In their memorandum defendants rely heavily on a portion of the Conference Report which states: "Section 8(b)(4)(A) of the conference agreement has been expanded to cover a matter which was covered by Section 12

of the House bill, namely, concerted activity by a union or its agents to compel an employer or self-employed person to become a member." House Conference Report No. 510, 80th Cong., 1st Sess. 44-45 (1947). Yet the Court finds that language to be ambiguous at best.[3] The reference to Section 12 of the house bill is a more enlightening reference than the use of the phrase "concerted activity by a union or its agents to compel an employer or self-employed person to become a member." Section 12(a)(3)(A)[4] of the House bill, when read in conjunction with Sections 2(16)[5]

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3. It seems quite likely that the phrase "to become a member" refers to compelling a self-employed person to join a labor organization, action which is also proscribed by Section 8(b)(4)(A). Regardless, the Court finds that the phrase "to become a member" sheds no light on the meaning of Section 8(b)(4)(A).

4. Section 12(a)(3) of H.R. 3020, 80th Cong., 1st Sess. (1947) provided:

"(a) The following activities, when affecting commerce, shall be unlawful concerted activities:

* * *

"(3) Calling, authorizing, engaging in, or assisting—

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises;

"(B) any strike or other concerted interference with an employer's operations, an object of which is to compel an employer to accede to featherbedding practices;

"(C) any strike or other concerted interference with an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate any law or any regulation, order, or direction issued pursuant to any law."

5. Section 2(16) of H.R. 3020, 80th Cong., 1st Sess. (1947) provided:

"The term 'monopolistic strike' means a strike or other concerted interference with an employer's operations which

and 9(f)(1)[6] of that bill, prohibited all industry-wide bargaining. Additionally, Section 12(b)[7] of the House bill provided a civil damage remedy to any person injured by such unlawful concerted activity. In that bill, the House had attempted to proscribe industry-wide bargaining which in turn would prevent industry-wide strikes. This intent is reflected both in the language of the bill and the House

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results from any conspiracy, collusion, or concerted plan of acting between employees of competing employers or between representatives of such employees, where the employees of such competing employers do not have a common bargaining representative certified under section 9."

6. Section 9(f)(1) of H.R. 3020, 80th Cong., 1st Sess. (1947) provided:

"(f) The Board shall exercise its powers under subsections (b) and (d) subject to the following limitations:

"(1) A representative that has been designated or acts as the representative of employees of any employer shall be ineligible to be certified as the representative of employees of any competing employer, unless the employees of such employers whom the representative seeks to represent are regularly less than one hundred in number and the plants or other facilities of such employers at which the representative acts and seeks to act as such are less than fifty miles apart, but nothing in this paragraph shall prevent any representatives from being affiiliated or associated, directly or through a federation, association, or parent organization, with representative of employees of competing employers, if the collective bargaining, concerted activities, or terms of collective bargains or arrangements of such representatives are not subject, directly or indirectly, to common control or approval."

7. Section 12(b) of H.R. 3020, 80th Cong., 1st Sess. (1947) provided:

"Any person injured in his business, person, or property by an unlawful concerted activity affecting commerce may sue the person or persons responsible therefor in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, and may recover the damages sustained by him as a result of such unlawful concerted activity, together with the costs of the suit, including a reasonable attorney's fee."

Report accompanying the bill.[8] The House bill apparently prohibited voluntary as well as involuntary multi-employer

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8. The House Report stated that the bill "outlaws the closed shop and monopolistic industry-wide bargaining[;] * * * outlaws * * * collusive strikes by employees of competing employers[.] * * * For unlawful concerted activities it gives the person injured thereby a right to sue civilly any person responsible therefor[.] * * * It removes the exemption of labor organizations from the antitrust laws when such organizations, acting either alone or in collusion with employers, engage in unlawful restraints of trade." House Report No. 245, 80th Cong., 1st Sess. 5-6 (1947). That report further provided:

> "The bill is the first serious attempt to deal with one of our country's greatest and more pressing problems, industry-wide bargaining and industry-wide strikes that paralyze our economy and that imperil the health and safety of our people.
>
> "The committee has dealt with this problem in two ways:
>
> "First, by amending the National Labor Relations Act, the bill forbids the Board to certify one union as the bargaining agent for employees of two or more competing employers, and also forbids employees of two or more competing employers to conspire together to strike at the same time." *Ibid.* at 8-9.

That the activity of defendants in the instant case would have been proscribed by the House bill is made clear by a further statement in the House Report which provides:

> "'Monopolistic strike': This is another unlawful activity under section 12. This forbids a strike or other concerted activity interfering with an employer's operations that results from any conspiracy, collusion, or concerted plan of acting between employees of *competing* employers, unless the employees of the competing employers have a common bargaining agent under section 9(f)(1). Section 9 permits employees of competing employers to have a common bargaining agent only if (1) the bargaining agent represents less than 100 employees of each employer and (2) the plants of the competing employers are less than 50 miles apart.
>
> "What this language, and that of section 9(f)(1), is intended to do is to put a stop to strikes that paralyze the economy of our country and imperil the health and safety of our people. We have laws to forbid competing employers to conspire together to close their plants, fix their prices, and otherwise to restrain trade. There is no justification for permitting employees of competing employers to enter into conspiracies that have the same effect. The language of the bill does not forbid employees of competing employers to strike at the same time. It forbids their doing so collusively." *Ibid.* at 24.

bargaining.[9] In the minority report on the House bill, there was strong criticism of the total proscription of industry-wide bargaining.[10]

The Senate bill underlying the LMRA allowed voluntary industry-wide or multi-employer bargaining; however, it apparently proscribed involuntary industry-wide bargain-

9. House Report No. 245 stated in pertinent part:
"Probably the most important clause of section 9(f) is that which limits industry-wide bargaining and which, with sections 2(16) and 12(3)(A), dealing with monopolistic strikes, is designed to put an end to strikes, such as we have experienced particularly in the coal and steel industries, in which powerful and Nation wide unions have brought the compelling pressure of strikes to bear more upon the Government and the public than upon the employers involved. *Arrangements by which competing employers combine, voluntarily or involuntarily, to bargain together, and arrangements by which giant national and international labor monopolies dictate the terms upon which competing employers must operate seriously undermine our free competitive system.* They undermine, also, the rights of the men in the mines and in the shops, who find their terms of employment determined not according to their circumstances and those of their employers but by arbitrary decisions of the national and international officers." *Ibid.* at 35 (emphasis supplied.

10. The minority report stated in pertinent part:
"Section 9(f) precludes the Board from certifying a single union as the representative of employees of competing employers, subject to extremely minor exceptions. This is further designed to implement the provisions against industry-wide bargaining upon which we have already commented. The language of this section which makes such representation legal 'if the collective bargaining, concerted activities, or terms of collective bargains or arrangements of such representatives are not subject, directly or indirectly, to common control or approval,' makes it clear that the sponsors of this bill desire bargaining only on an individual employer basis. Under the realities of modern industrial life, any such proposal is pure fantasy. It disregards the fact that employers compete with one another, both as to the price and quality of their product, and for labor. It is unthinkable, for example, that the large automobile manufacturers, all of whom compete for labor in the Detroit market, can pay appreciably different wages. Yet, this provision would necessarily mean that the wage levels of entire industries would be forced down to the lowest level which any substantial group of employees were inclined to, or could, accept." *Ibid* at 86.

ing. S. 1126, 80th Cong., 1st Sess. §§ 2(2), 9 (1947). Section 9(b) of that bill provided, *inter alia,* that: "The Board shall decide *in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof" (emphasis supplied). Additionally, Section 2(2) provided that "for the purposes of section 9(b) hereof, the term 'employer' shall not include a group of employers *except where such employers have voluntarily associated themselves together* for the purposes of collective bargaining" (emphasis supplied). It was after the passage of the House and Senate bills with their conflicting provisions *vis a vis* industry-wide bargaining that the language at issue in the instant case was inserted into the LMRA.

In light of this legislative history, the Court concludes that Congress intended to proscribe involuntary industry-wide bargaining when it enacted Section 8(b)(4)(A). Accordingly, the Court holds that Section 8(b)(4)(A) proscribes not only strikes where an object thereof is to force an employer to join a formal employer organization, but also strikes where an object thereof is to force several employers to act in effect as if they belonged to such an employer organization which engaged in industry-wide bargaining on their behalf. To hold otherwise would be to exalt form over substance and disregard the totality of the forces which gave rise to Section 8(b)(4)(A). If defendants conduct their collective bargaining in a manner which forces employers in an industry to act as they would, were they members of a formal employer organization, then there is no reason not to subject them to civil liability under Section 303(b) of the LMRA.

Thus, the remaining issue before the Court is to determine whether plaintiff has alleged facts which if true would subject defendants to civil liability under Section 303(b) in light of the Court's construction of Section 8(b)(4)(A). More specifically, the Court must decide whether the allegations in the complaint establish that an object of the strike in question was to force plaintiff, Scudder's and Goose to bargain and act as if they belonged to a formal employer organization. Although the Court is not certain of the precise economic impact of the alleged conduct of defendants on the collective bargaining process in the instant case and is not certain whether the nonexistence of any of the conduct in question would vitiate the Court's conclusion, the Court concludes that the facts alleged establish that an object of defendant's strike was to force plaintiff to bargain and act as if it belonged to a formal employer organization.

The key factors which lead the Court to conclude that plaintiff has stated a claim under Section 303(b) can be divided into two categories, those factors which establish the economic effect of the conduct of defendants and those factors which bear on the issue of intent.[11] With respect to the economic effect of defendants' conduct, a course of conduct wherein defendants would conditionally accept plaintiff's contract proposals contingent upon acceptance of the exact same proposal by Scudder's and Goose, wherein all contract proposals by plaintiff could only be ratified by a group vote of the employees of all three companies and not just the employees of plaintiff, wherein defendants repeat-

11. The Court is not certain to what extent an action under Section 303(b) requires proof of intent on the part of defendants. Nevertheless, as is set forth below, it believes that the allegations of the complaint are sufficient to meet any attack on this ground in a motion to dismiss.

edly demanded that the three companies agree to one contract covering employees of all three companies or to three separate uniform contracts containing identical provisions for each company, and wherein defendants demanded that plaintiff agree to contract provisions which were inapplicable to plaintiff's business operations but applicable to the business operations of Goose or Scudder's, is exactly equivalent to forcing the three companies to form an employer organization to conduct collective bargaining. Which of these factors are necessary or sufficient elements of a claim under Section 303(b), the Court need not decide as it concludes that collectively they establish the requisite economic impact. The Court does note that the first factor mentioned, that of conditioning any acceptance upon execution of identical contracts with the other two companies, renders it impossible to have anything other than one uniform contract for the three companies, regardless of the bargaining power of the parties. With respect to the question of intent, defendants' demand for either one contract covering the employees of all three companies or three separate uniform contracts containing identical provisions for each company, defendants' adoption of this demand as a stated object of its strike, defendants' insistence that plaintiff agree to contract provisions inapplicable to plaintiff's business operations but applicable to the operations of Goose and Scudder's, and defendants' insistence upon group voting by all the employees of the three companies as the means by which plaintiff's contract proposals would be ratified, give rise to a strong inference that defendants intended to force the plaintiff to bargain as if it were a member of an actual employer organization. Moreover, it is quite possible that there is no intent element under Section 303(b) and that the law will impute to defendants, as an object of their conduct, the natural and probable consequences of their

acts. Accordingly, the Court holds that plaintiff has stated a claim under Section 303(b).

IT IS HEREBY ORDERED that defendants' motion to dismiss is denied.

Dated: September 15, 1975.

CHARLES B. RENFREW

Charles B. Renfrew
United States District Judge

Appendix "C"

The Findings of Fact, Conclusions of Law and Order of the United States District Court for the Northern District of California dated and filed on March 26, 1976, following trial on the issue of liability, is reprinted below.

Filed
Mar 26 1976
WILLIAM L. WHITTAKER, *Clerk*

United States District Court
Northern District of California

No. C-74-1092-CBR

FRITO-LAY, INC., a Delaware Corporation,
Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association; et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled action was tried to the Court on a bifurcated basis with the issue of liability tried on September 22, 23, 24, 25, 30 and October 1, 1975. Duane C. Aldrich of the law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein appearing as counsel for plaintiff Frito-Lay, Inc. ("Frito-Lay"), and Kenneth N. Silbert of the law firm of Brundage Beeson, Tayer & Kovach appearing as counsel for defendants; evidence having been taken; the arguments of counsel having been heard and consid-

ered; and the parties having submitted post-trial proposed findings of fact and conclusions of law; the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Frito-Lay is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business in Dallas, Texas.

2. Frito-Lay manufactures, sells, and distributes potato chips, corn chips, and other snack food products within the Northern District of California and elsewhere in the State of California.

3. Defendants are the following local unions and joint councils affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America:

a. Local Union 137	1303 F Street Marysville, CA 95901
b. Local Union 150	7120 East Parkway Sacramento, Ca 95823
c. Local Union 278	4752 Mission Street, Room 101 San Francisco, CA 94112
d. Local Union 296	3275 Stevens Creek Boulevard Room 304 San Jose, CA 95117
e. Local Union 315	2727 Alhambra Avenue, Suite 1 Martinez, CA 94553
f. Local Union 386	1225 Thirteenth Street Modesto, CA 95354
g. Local Union 431	1140 West Olive Street Fresno, CA 93728
h. Local Union 439	1531 E. Fremont Street Stockton, CA 95201
i. Local Union 490	455 Nebraska Street Vallejo, CA 94590

j.	Local Union 533	1550 Glendale Road Sparks, Nevada 89431
k.	Local Union 588	8055 Collins Drive Oakland, CA 94621
l.	Local Union 624	P. O. Box 765 Novato, CA 94947
m.	Local Union 890	207 Sanborn Road Salinas, CA 93901
n.	Local Union 912	163 West Lake Avenue Watsonville, CA 95076
o.	Local Union 980	1371 Neotomas Avenue Santa Rosa, CA 95403
p.	Joint Council 7	1139 Mission Street San Francisco, CA 94103
q.	Joint Council 38	1722 J Street, Suite 8 Sacramento, CA 95814

4. Laura Scudder's, a snack food division of Pet, Inc., with its principal office and place of business in Anaheim, California ("Scudder's"), manufactures, sells, and distributes potato chips, corn chips, and other snack food products within the Northern District of California and elsewhere in the State of California.

5. Granny Goose Foods, Inc., a corporation organized and existing under the laws of the State of California with its principal office and place of business in Oakland, California ("Goose"), manufactures, sells, and distributes potato chips, corn chips, and other snack food products within the Northern District of California and elsewhere in the State of California.

6. Frito-Lay, Scudder's and Goose (the "three companies") are engaged in vigorous competition in the sale and distribution of potato chip, corn chip, and other snack food products within the Northern District of California and elsewhere in the State of California.

7. Between 1960 and on or about December 14, 1973, the three companies were members of an employer organization within the meaning of the Labor Management Relations Act, 1947, 29 U.S.C. §§ 151-187 ("LMRA"). The employer organization was created and maintained for the purpose of bargaining for and entering into collective bargaining agreements with defendants.

8. The employer organization bargained with the defendant local unions on behalf of the three companies and negotiated collective bargaining agreements, each of which was one contract signed by the defendant local unions and the three companies covering the three companies' route salesmen and warehouse employees. Such a contract between the three companies and the defendant local unions was in effect for each of the following periods:

a. March 1, 1960—February 28, 1962
b. March 1, 1962—February 28, 1965
c. March 1, 1965—February 28, 1968
d. March 1, 1968—February 28, 1971
e. March 1, 1971—February 28, 1974

9. Each such contract was ratified by the defendant local unions in the following manner: employees of the three companies voted together to accept or reject the employer organization's contract proposal. This method of ratification voting by employees of more than one company will hereinafter sometimes be referred to as "group voting".

10. By letter dated December 14, 1974, Frito-Lay notified the defendant local unions, Scudder's, and Goose of its withdrawal from the employer organization and announced that it would thereafter bargain on its own behalf with the defendant local unions. This notice of withdrawal was timely and proper and therefore obligated the defend-

ant local unions to bargain with Frito-Lay on an individual basis pursuant to the LMRA.

11. Frito-Lay's decision to withdraw from the employer organization was based upon factors peculiar to its method of distribution of its products which emphasized different methods of compensation to its salesmen than those utilized by its competition.

12. By letter dated January 10, 1974, Goose notified Frito-Lay, Scudder's, and the defendant local unions of its withdrawal from the employer organization and announced that it would thereafter bargain on its own behalf with the defendant local unions. This notice of withdrawal was timely and proper and therefore obligated the defendant local unions to bargain with Goose on an individual basis pursuant to the LMRA.

13. On November 29, 1973, the defendant local unions selected a committee (the "negotiating committee") to represent the defendant local unions in negotiating a collective bargaining agreement with the three companies to replace the contract which was to expire by its own terms on February 28, 1974.

14. The defendant local unions empowered and authorized the negotiating committee to act as their agent for purposes of collective bargaining with the three companies.

15. The intent of the negotiating committee was in effect to force the three companies to reconstitute the employer organization and to negotiate a multi-employer contract.

16. The negotiating committee requested that the three companies meet together with it on January 28, 1974, for the purpose of beginning negotiations. Each company, insisting upon its right to negotiate separately and independently, agreed to attend the meeting in order to receive the initial contract proposal. The contract proposal submitted at this meeting was contained in a single document ad-

dressed to all three companies jointly and was applicable, without variation, to all three companies. It was a proposal for a multi-employer contract.

17. At the January 28th meeting the negotiating committee began the negotiations by demanding a multi-employer contract to be ratified by the group vote of the employees of all three companies. The negotiating committee then requested that the three companies attend joint bargaining sessions with the negotiating committee, as had been the practice before the dissolution of the employer organization.

18. At the January 28th meeting, each of the three companies announced that it would bargain independently for a separate contract and that it expected its own employees to vote separately on its proposals. Each company further stated that it would not attend joint bargaining sessions.

19. During the negotiations the negotiating committee insisted upon and repeatedly demanded that the three companies agree to one contract covering employees of all three companies (a "multi-employer contract") or that the three companies agree to three separate uniform contracts containing identical provisions for each company. Defendants offered no proposals that were not uniform for the three companies.

20. During the negotiations each of the three companies insisted upon and repeatedly demanded that the negotiating committee bargain with it separately and in good faith in order to negotiate a separate contract covering only its employees and containing provisions and language suitable to its business operations and the needs of its employees. Each company presented all of its contract proposals in the form of a separate contract covering only its employees.

21. During the negotiations the negotiating committee insisted upon and demanded that Frito-Lay agree to contract provisions that were inapplicable to Frito-Lay's business operations, but applicable to the business operations of Goose or Scudder's.

22. At various times during the negotiations, the negotiating committee conditionally accepted Frito-Lay's contract proposals contingent upon acceptance of the exact same proposals by Goose and Scudder's. Defendants used this tactic to force or require Frito-Lay to accept a multi-employer contract.

23. At various times during the negotiations, the negotiating committee arranged joint meetings to force the three companies to negotiate identical contract language.

24. On May 3, 1974, the negotiating committee effected a settlement with Goose and agreed to recommend the Goose contract proposal for ratification by the membership at the May 11, 1974, membership meeting. The negotiating committee presented the Goose settlement agreement to Scudder's and Frito-Lay on May 7 and May 8, respectively, and insisted that Scudder's and Frito-Lay accept that agreement. Defendants failed to recommend the Goose settlement agreement for ratification at the May 11 meeting of the membership, because Frito-Lay and Scudder's refused to accept that agreement.

25. On February 23, March 30, April 27, and May 11, 1974, separate contract proposals of each company were submitted separately to all members of defendants. Each individual company's proposal was voted on by the employees of all three companies ("group voting"). On none of these occasions were employees allowed to vote alone on the proposal of their own company. Each company repeatedly demanded that its contract proposals be voted on

for ratification by its employees only. Defendants used group voting to insure the ratification of a multi-employer contract and to force or require the three companies to reconstitute the employer organization.

26. Following the membership's rejection of each company's proposal on May 11, defendants commenced a strike against all three companies on May 12, 1974. The object of the strike was to force or require the three companies to accept one contract covering employees of all three companies or to accept three separate uniform contracts containing identical provisions for each company. The strike remained in effect against Frito-Lay until June 29, against Scudder's until June 15, and against Goose until June 7, 1974.

27. The strike against Frito-Lay resulted in picketing and cessation of business at Frito-Lay's production facility in San Jose, California, where Frito-Lay employees represented by a Teamster's local union not a defendant in this action refused to cross defendants' picket lines, and at Frito-Lay's distribution centers throughout Central and Northern California and Reno, Nevada, during the period May 12, 1974, through on or about June 29, 1974.

28. On June 3, 1974, the Western Conference of Teamsters ordered defendants to stop using the group voting procedure and to allow each company's contract proposal to be voted upon by its own employees. Subsequent to that order, the Goose employees, voting separately, ratified a Goose contract proposal on June 6, 1974. Thereafter, defendants insisted upon and demanded that Frito-Lay and Scudder's agree to a uniform contract having the same overall cost as the Goose contract. Contract proposals by Scudder's and Frito-Lay were finally ratified by their employees who were allowed to vote separately for ratification on June 18 and June 29, 1974, respectively.

29. Based upon all the evidence in the record, the object of defendants' strike was to force or require Frito-Lay to bargain and act as if it belonged to an employer organization.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to Section 303 of the Labor Management Relations Act of 1947, 29 U.S.C. § 187(b) ("LMRA"), and venue is proper in this District.

2. Frito-Lay is an employer within the meaning of Section 2(2) of LMRA, 29 U.S.C. § 152(2), and is engaged in commerce within the meaning of Section 2(6) of LMRA.

3. Defendants are labor organizations within the meaning of Section 2(5) of LMRA.

4. By engaging in, and by inducing and encouraging employees of Frito-Lay to engage in, a strike and a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; and by threatening, coercing, and restraining Frito-Lay, the object thereof having been in effect to force Frito-Lay to join an employer organization; defendants have engaged in unfair labor practices within the meaning of Section 8(b)(4)(A) of LMRA, 29 U.S.C. §158(b)(4)(A).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that plaintiff Frito-Lay, Inc., shall recover the damages sustained by it and the costs of suit, which amount shall be proven at the subsequent trial on damages.

Dated: March 26, 1976.

CHARLES B. RENFREW
Charles B. Renfrew
United States District Judge

Appendix "D"

The Findings of Fact, Conclusion of Law and Order of the United States District Court for the Northern District of California, dated February 4, 1977 and filed on February 8, 1977, following trial on the issue of damages is reprinted below.

ORIGINAL
FILED
FEB 8 1977
Clerk, U.S. Dist. Court
San Francisco

United States District Court
Northern District of California

No. C-74-1092-CBR

FRITO-LAY, INC., a Delaware Corporation,

Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association; et al.,

Defendants.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The second phase of the above-entitled action was tried to the Court on the issue of damages on July 14 and 15, 1976. Duane C. Aldrich of the law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein appearing as counsel for

plaintiff Frito-Lay, Inc. ("Frito-Lay"), and Kenneth N. Silbert of the law firm of Brundage, Beeson, Tayer & Kovach appearing as counsel for defendants; evidence having been taken; the arguments of counsel having been heard and considered; and the parties having submitted post-trial briefs and proposed findings of fact and conclusion of law; the Court makes the following Findings of Fact and Conclusion of Law.

FINDINGS OF FACT

1. Based upon all the evidence in the record, Frito-Lay sustained lost profits in the amount of $554,154 as the direct result of defendants' illegal strike.

2. Based upon all the evidence in the record, Frito-Lay sustained extraordinary expenses in the amount of $134,364 as the direct result of defendants' illegal strike.

CONCLUSION OF LAW

1. Frito-Lay shall recover from defendants, jointly and severally, the sum of $688,518, plus the costs of suit, pursuant to Section 303(b) of the Labor Management Relations Act of 1947, 29 U.S.C. § 187(b).

Based upon the foregoing findings of fact and conclusion of law,

IT IS HEREBY ORDERED that judgment shall be entered in favor of plaintiff Frito-Lay, Inc.

IT IS HEREBY FURTHER ORDERED that counsel for plaintiff shall promptly prepare an appropriate form of judgment, submit it to counsel for defendants for approval as to form, and then submit it to the Court for execution.

Dated: February 4, 1977

CHARLES B. RENFREW
Charles B. Renfrew
United States District Judge

Appendix "E"

The Judgment of the United States District Court for the Northern District of California, dated on February 23, 1977 and entered in the Civil Docket of that Court on February 25, 1977, is reprinted below.

RECEIVED
FEB 22 1977
Clerk, U. S. District Court
San Francisco
FILED
FEB 23 1977
William L. Whittaker, Clerk

United States District Court
Northern District of California

No. C-74-1092-CBR

FRITO-LAY, INC.,

Plaintiff,

vs.

LOCAL UNION No. 137, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *et al.,*

Defendants.

JUDGMENT

This action having come on for trial on a bifurcated basis before the Court, Honorable Charles B. Renfrew, United States District Judge, presiding, with the issue of liability

tried on September 22, 23, 24, 25, 30, and October 1, 1975, and the issue of damages tried on July 14 and 15, 1976; the issues having been duly tried, and decisions having been duly rendered with respect to both liability and damages;

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff, FRITO-LAY, INC., and against defendants, jointly and severally, in the sum of SIX HUNDRED EIGHTY-EIGHT THOUSAND FIVE HUNDRED EIGHTEEN AND NO/100 ($688,518.00) DOLLARS, with interest thereon at the legal rate per annum as provided by law, plus its costs of action. Said defendants are the following local unions affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America: LOCAL UNION NO. 137, Marysville, California; LOCAL UNION NO. 150, Sacramento, California; LOCAL UNION NO. 278, San Francisco, California; LOCAL UNION NO. 296, San Jose, California; LOCAL UNION NO. 315, Martinez, California; LOCAL UNION NO. 386, Modesto, California; LOCAL UNION NO. 431, Fresno, California; LOCAL UNION NO. 439, Stockton, California; LOCAL UNION NO. 490, Vallejo, California; LOCAL UNION NO. 533, Sparks, Nevada; LOCAL UNION NO. 588, Oakland, California; LOCAL UNION NO. 624, Novato, California; LOCAL UNION NO. 890, Salinas, California; LOCAL UNION NO. 912, Watsonville, California; LOCAL UNION NO. 980, Santa Rosa, California.

Dated at San Francisco, California, this 23 day of February, 1977.

Charles B. Renfrew
Judge US District Court

Filed in Clerk's Office
on February 23, 1977.

Appendix "F"

The Motion to Amend Findings of Fact and Conclusions of Law, and the Order granting said Motion dated and filed on March 4, 1977, is reprinted below.

ORIGINAL FILED
Mar 4 1977
Clerk U.S. District Court
San Francisco

KENNETH N. SILBERT, ESQ.,
BRUNDAGE, BEESON, TAYER & KOVACH
100 Bush Street, Ste. 1500
San Francisco, Calif. 94104
Telephone (415) 986-4060

United States District Court
Northern District of California

No. C-74-1092 CBR

FRITO-LAY, INC.,

Plaintiff,

LOCAL UNION No. 137, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *et al.*,

Defendants.

MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, Defendants and each of them, hereby move the Court to amend its Findings of Fact, Conclusions of Law and Order, dated March 26, 1976, as follows:

1. By deleting the designation of Defendants in the Caption, and substituting in lieu thereof the following:

Local Union No. 137, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *et al.*

2. By adding to the Court's Findings of Fact a new Paragraph to read as follows:

3. The term "defendants" as in Paragraphs (1) and (2), above, refers only to the defendants LOCAL UNION NO. 137, Marysville, California; LOCAL UNION NO. 150, Sacramento, California; LOCAL UNION NO. 278, San Francisco, California; LOCAL UNION NO. 296, San Jose, California; LOCAL UNION NO. 315, Martinez, California; LOCAL UNION NO. 386, Modesto, California; LOCAL UNION NO. 431, Fresno, California; LOCAL UNION NO. 439, Stockton, California; LOCAL UNION NO. 490, Vallejo, California; LOCAL UNION NO. 533, Sparks, Nevada; LOCAL UNION NO. 588, Oakland, California; LOCAL UNION NO. 624, Novato, California; LOCAL UNION NO. 890, Salinas, California; LOCAL UNION NO. 912, Watsonville, California; LOCAL UNION NO. 980, Santa Rosa, California.

3. By inserting after the word "defendants" in Paragraph (1), on page 2, line 6, of the Court's Conclusions of Law the following phrase:

LOCAL UNION NO. 137, Marysville, California; LOCAL UNION NO. 150, Sacramento, California; LOCAL UNION NO. 278, San Francisco, California; LOCAL UNION NO. 296, San Jose, California; LOCAL UNION NO. 315, Martinez, California;

LOCAL UNION NO. 386, Modesto, California; LOCAL UNION NO. 431, Fresno, California; LOCAL UNION NO. 439, Stockton, California; LOCAL UNION NO. 490, Vallejo, California; LOCAL UNION NO. 533, Sparks, Nevada; LOCAL UNION NO. 588, Oakland, California; LOCAL UNION NO. 624, Novato, California; LOCAL UNION NO. 890, Salinas, California.

30. The terms "defendant", "defendants" and "defendant local unions" as used in Paragraphs 7 through 29, inclusive, of these Findings of Fact refer only to those defendants set forth in Paragraph 3, subparagraphs (a)-(o), inclusive, of these Findings of Fact.

3. By inserting after the word "defendants" in Paragraph 4, on page 8, line 31, of the Court's Conclusions of Law the following phrase:

Local Union No. 137, Marysville, California; Local Union No. 150, Sacramento, California; Local Union No. 278, San Francisco, California; Local Union No. 296, San Jose, California; Local Union No. 315, Martinez, California; Local Union No. 386, Modesto, California; Local Union No. 431, Fresno, California; Local Union No. 439, Stockton, California; Local Union No. 490, Vallejo, California; Local Union No. 533, Sparks, Nevada; Local Union No. 588, Oakland, California; Local Union No. 624, Novato, California; Local Union No. 890, Salinas, California; Local Union No. 912, Watsonville, California; Local Union No. 980, Santa Rosa, California.

II.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, Defendants, and each of them, hereby move the

Court to amend its Findings of Fact, Conclusions of Law and Order, dated February 4, 1977, as follows:

1. By deleting the designation of Defendants in the Caption, and substituting in lieu thereof the following:

> Local Union No. 137, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *et al.*

2. By adding to the Court's Findings of Fact a new Paragraph to read as follows:

> 3. The term "defendants" as in Paragraphs (1) and (2), above, refers only to the defendants Local Union No. 137, Marysville, California; Local Union No. 150, Sacramento, California; Local Union No. 278, San Francisco, California; Local Union No. 296, San Jose, California; Local Union No. 315, Martinez, California; Local Union No. 386, Modesto, California; Local Union No. 431, Fresno, California; Local Union No. 439, Stockton, California; Local Union No. 490, Vallejo, California; Local Union No. 533, Sparks, Nevada; Local Union No. 588, Oakland, California; Local Union No. 624, Novato, California; Local Union No. 890, Salinas, California; Local Union No. 912, Watsonville, California; Local Union No. 980, Santa Rosa, California.

3. By inserting after the word "defendants" in Paragraph (1), on page 2, line 6, of the Court's Conclusions of Law the following phrase:

> Local Union No. 137, Marysville, California; Local Union No. 150, Sacramento, California; Local Union No. 278, San Francisco, California; Local Union No. 296, San Jose, California; Local Union No. 315, Mar-

tinez, California; Local Union No. 386, Modesto, California; Local Union No. 431, Fresno, California; Local Union No. 439, Stockton, California; Local Union No. 490, Vallejo, California; Local Union No. 533, Sparks, Nevada; Local Union No. 588, Oakland, California; Local Union No. 624, Novato, California; Local Union No. 890, Salinas, California; Local Union No. 912, Watsonville, California; Local Union No. 980, Santa Rosa, California.

BRUNDAGE, BEESON, TAYER & KOVACH

By: .....
Kenneth N. Silbert
Attorneys for

SO ORDERED: 3-4-77

CHARLES B. RENFREW
United States District Judge

Appendix "G"

The Amendment to Findings of Fact, Conclusions of Law and Orders of the United States District Court for the Northern District of California, dated and filed on March 21, 1977, is reprinted below.

FILED
MAR 21 1977
William L. Whittaker, *Clerk*

United States District Court
Northern District of California

No. C-74-1092 CBR

FRITO-LAY, INC.,

Plaintiff,

v.

LOCAL UNION No. 137, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *et al.*,

Defendants.

AMENDMENT TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

With the consent of all parties, the Court amends its Findings of Fact, Conclusions of Law and Order, dated March 26, 1976, and its Findings of Fact, Conclusions of Law and Order, dated February 4, 1977, as follows:

The terms "defendant," "defendants," and "defendant local unions," as used in paragraphs 7 through 29 of the

Findings of Fact and paragraph 4 of the Conclusions of Law dated March 26, 1976, and as used in the Findings of Fact, Conclusions of Law and Order dated February 4, 1977, do not include defendants Joint Council Number 7 or Joint Council Number 38.

IT IS SO ORDERED, this 21 day of March, 1977.

Consented to by:

CHARLES B. RENFREW
Charles B. Renfrew, Judge
United States District Court

DUANE C. ALDRICH
(by JWD w/permission)
Duane C. Aldrich
Attorney for Plaintiff

KENNETH N. SILBERT
Kenneth N. Silbert
Attorney for Defendants

Appendix "H"

Pages 20, 21 and 22 of the pre-trial deposition of Harry Marashian are reprinted below:

MR. DORN: Q. Was it your practice during the negotiations to handle written notes of discussions that took place during various meetings?

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Q. Have you given your Attorney all of your files in connection with the negotiation of this contract?

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Q. And there aren't any other documents or notes in your files that you have not provided?

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Does Plaintiff's Exhibit 4 contain your handwritten notes that were taken at the meeting on January 28?

A. Uh-huh, yes.

Q. Do those notes refresh your memory as to what took place at that meeting with the potato chip companies on January 28?

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Q. And the companies rejected this proposal; is that correct?

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Q. And that was the position of the Negotiating Committee that there would be only one contract?

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(A one-page document on the letterhead of General Teamsters' Union Local No. 431 was marked as Plaintiff's Exhibit 5 for identification.)

MR. DORN: Q. The Court Reporter has marked as Plaintiff's Exhibit 5 a one-page document containing a list of names. Can you tell me what this list was made for?

(Pause while Witness examines document.)

THE WITNESS: I am assuming it might be the proposal meeting of the potato

MR. SILBERT: Harry, if you don't know—.

THE WITNESS: I don't know. Okay.

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No.80-514

Supreme Court, U. S.
FILED
NOV 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION NO. 137; LOCAL UNION NO. 150; LOCAL UNION NO. 278; LOCAL UNION NO. 296; LOCAL UNION NO. 315; LOCAL UNION NO. 386; LOCAL UNION NO. 431; LOCAL UNION NO. 439; LOCAL UNION NO. 490; LOCAL UNION NO. 533; LOCAL UNION NO. 588; LOCAL UNION NO. 624; LOCAL UNION NO. 980, all affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

v.

FRITO-LAY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DUANE C. ALDRICH
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QUESTIONS PRESENTED[1]

The issue presented for review by Petitioners is more properly stated as follows:[2]

1. Whether the court of appeals correctly concluded that substantial evidence in the record supports the district court's factual finding that the object of the Union's strike was to force or require Frito-Lay to bargain and act as if it belonged to an employer organization.

In the event the Petition is granted to determine the foregoing question, Petitioners have requested the Court to review two additional questions, which are more properly stated as follows:

2. Whether the court of appeals correctly concluded that substantial evidence in the record supports the district court's factual finding that the Union did not abandon its illegal strike objective prior to commencement of the strike.

3. Whether the court of appeals correctly concluded that substantial evidence in the record supports the district court's finding that the Union's illegal strike objective was a substantial—if not the sole—cause of the strike, thus entitling Frito-Lay to recover damages attributable to the strike.

---

[1]Respondent, Frito-Lay, Inc., is a wholly-owned subsidiary of PepsiCo, Inc.

[2]The Union concedes that the court of appeals and the district court correctly held that Section 8(b)(4)(A) proscribes forced multi-employer bargaining and not merely forced membership in a formal multi-employer organization. (Petition, at 12) In view of that concession, this Court should summarily reject the Union's attempt to transform a simple factual finding of two lower courts into a novel question of law that warrants *certiorari* review.

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203 NLRB 230, 83 LRRM 1099 (1973), *enforced,*
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Section 8(b)(4)(A) ..... *passim*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-514

LOCAL UNION NO. 137; LOCAL UNION NO. 150; LOCAL UNION NO. 278; LOCAL UNION NO. 296; LOCAL UNION NO. 315; LOCAL UNION NO. 386; LOCAL UNION NO. 431; LOCAL UNION NO. 439; LOCAL UNION NO. 490; LOCAL UNION NO. 533; LOCAL UNION NO. 588; LOCAL UNION NO. 624; LOCAL UNION NO. 980, all affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

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v.

FRITO-LAY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Frito-Lay, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Frito-Lay filed its Complaint in May of 1974, alleging that the defendant Union Locals (hereinafter, the "Union") were then engaged in a strike in Central and Northern California having an illegal object of forcing or requiring Frito-Lay to join an employer organization in violation of Section 8(b)(4)(A) of the Labor Management Relations Act, 29 U.S.C. §151, *et seq*, (hereinafter, the "Act"). Subject matter jurisdiction was based upon Section 303 of the Act, which provides that whoever shall be injured in his business by an unfair labor practice as defined in Section 8(b)(4) of the Act may bring suit in federal district court to recover damages and the cost of the suit.

In ruling upon defendants' Motion to Dismiss the Second Amended Complaint[3] (R. 167-169), the trial court issued a Memorandum of Opinion (R. 196-207) detailing its interpretation of Section 8(b)(4)(A) as applied to the allegations of this case. The court carefully reviewed the legislative history of Section 8(b)(4)(A) and concluded that Congress intended the proscription against "forcing or requiring any employer . . . to join any . . . employer organization" to prohibit involuntary multi-employer bargaining. Accordingly, the court held that Section 8(b)(4)(A) proscribes not only strikes where an object thereof is to force an employer to join a formal employer organization, but also strikes where an object thereof is to force several employers to act in effect

---

[3]In the Second Amended Complaint, Frito-Lay set forth in detail its factual allegations as of that date.

Court to amend its Findings of Fact, Conclusions of Law and Order, dated February 4, 1977, as follows:

1. By deleting the designation of Defendants in the Caption, and substituting in lieu thereof the following:

> Local Union No. 137, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *et al.*

2. By adding to the Court's Findings of Fact a new Paragraph to read as follows:

> 3. The term "defendants" as in Paragraphs (1) and (2), above, refers only to the defendants Local Union No. 137, Marysville, California; Local Union No. 150, Sacramento, California; Local Union No. 278, San Francisco, California; Local Union No. 296, San Jose, California; Local Union No. 315, Martinez, California; Local Union No. 386, Modesto, California; Local Union No. 431, Fresno, California; Local Union No. 439, Stockton, California; Local Union No. 490, Vallejo, California; Local Union No. 533, Sparks, Nevada; Local Union No. 588, Oakland, California; Local Union No. 624, Novato, California; Local Union No. 890, Salinas, California; Local Union No. 912, Watsonville, California; Local Union No. 980, Santa Rosa, California.

3. By inserting after the word "defendants" in Paragraph (1), on page 2, line 6, of the Court's Conclusions of Law the following phrase:

> Local Union No. 137, Marysville, California; Local Union No. 150, Sacramento, California; Local Union No. 278, San Francisco, California; Local Union No. 296, San Jose, California; Local Union No. 315, Mar-

tinez, California; Local Union No. 386, Modesto, California; Local Union No. 431, Fresno, California; Local Union No. 439, Stockton, California; Local Union No. 490, Vallejo, California; Local Union No. 533, Sparks, Nevada; Local Union No. 588, Oakland, California; Local Union No. 624, Novato, California; Local Union No. 890, Salinas, California; Local Union No. 912, Watsonville, California; Local Union No. 980, Santa Rosa, California.

BRUNDAGE, BEESON, TAYER & KOVACH

By: .....
Kenneth N. Silbert
Attorneys for

SO ORDERED: 3-4-77

CHARLES B. RENFREW
United States District Judge

Appendix "G"

The Amendment to Findings of Fact, Conclusions of Law and Orders of the United States District Court for the Northern District of California, dated and filed on March 21, 1977, is reprinted below.

FILED
MAR 21 1977
William L. Whittaker, *Clerk*

United States District Court
Northern District of California

No. C-74-1092 CBR

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Consented to by:

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Charles B. Renfrew, Judge
United States District Court

DUANE C. ALDRICH
(by JWD w/permission)
Duane C. Aldrich
Attorney for Plaintiff

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In ruling upon defendants' Motion to Dismiss the Second Amended Complaint[3] (R. 167-169), the trial court issued a Memorandum of Opinion (R. 196-207) detailing its interpretation of Section 8(b)(4)(A) as applied to the allegations of this case. The court carefully reviewed the legislative history of Section 8(b)(4)(A) and concluded that Congress intended the proscription against "forcing or requiring any employer . . . to join any . . . employer organization" to prohibit involuntary multi-employer bargaining. Accordingly, the court held that Section 8(b)(4)(A) proscribes not only strikes where an object thereof is to force an employer to join a formal employer organization, but also strikes where an object thereof is to force several employers to act in effect

[3]In the Second Amended Complaint, Frito-Lay set forth in detail its factual allegations as of that date.

as if they belong to such an employer organization. (R. 205) Based on that interpretation of Section 8(b)(4)(A), the court ruled that Frito-Lay's allegations stated a claim for relief. (R. 207)

Contrary to the Union's suggestion in its Petition, the district court's Memorandum of Opinion denying the Union's Motion to Dismiss did not encompass a consideration of "substantially all of the material facts subsequently relied on by the court in making its decision." (Petition, at 9) During the trial of the issue of liability, Frito-Lay offered significant evidence not alluded to by the allegations of the Second Amended Complaint. In particular, Frito-Lay offered evidence (1) that the Union's intent was to force Frito-Lay and its two snack food competitors, Granny Goose Foods, Inc. ("Goose") and Laura Scudder's ("Scudder's"), to reconstitute the employer organization and to negotiate a multi-employer contract, (2) that the Union failed to recommend the May 3, 1974 "settlement" with Goose for ratification at the May 11 membership meeting because Frito-Lay and Scudder's refused to accept that settlement as a multi-employer contract covering their employees as well, and (3) that the Union arranged joint meetings to force the three companies to negotiate identical contract language.

After the trial of liability, the district court found, *inter alia*, that "the intent of the negotiating committee was in effect to force the three companies to reconstitute the employer organization and to negotiate a multi-employer contract." (Findings, ¶ 15, R. 384) The court further found that during the negotiations the Union (1) insisted upon and repeatedly demanded that the three companies agree to either a multi-employer contract or three separate but

identical contracts (Findings, ¶ 19, R. 384-85); (2) insisted upon and demanded that Frito-Lay agree to contract provisions that were inapplicable to Frito-Lay's business operations, but applicable to the business operations of Goose or Scudder's (Findings, ¶ 21, R. 385); (3) at various times conditionally accepted Frito-Lay's contract proposals contingent upon acceptance of the exact same proposals by Goose and Scudder's in order to force Frito-Lay to accept a multi-employer contract (Findings, ¶ 22, R. 385); (4) at various times arranged joint meetings to force the three companies to negotiate identical contract language (Findings, ¶ 23, R. 385); (5) failed to ratify the Goose settlement at the May 11 meeting of the membership because Frito-Lay and Scudder's refused to accept that agreement (Findings, ¶ 24, R. 385-86); and (6) used group voting on February 23, March 30, April 27, and May 11, 1974 to insure the ratification of a multi-employer contract and to force the three companies to reconstitute the employer organization. (Findings, ¶ 25, R. 386)

Based upon all the evidence in the record, the district court found that "the object of defendants' strike was to force or require Frito-Lay to bargain and act as if it belonged to an employer organization." (Findings, ¶ 29, R. 387) The court thus concluded that the Union had engaged in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act (Conclusions, ¶ 4, R. 387), and ordered that Frito-Lay should recover its damages in the amount proven at the damage phase of the trial. (Order, R. 388)

The trial court subsequently found that Frito-Lay sustained lost profits of $554,154 and extraordinary expenses of $134,364, both "as the direct result of defendants' illegal strike." (Findings, ¶ ¶ 1-2, R. 548-49) Judgment was ac-

cordingly entered in favor of Frito-Lay and against defendants in the sum of $688,518. (R. 550-551)

On appeal to the Court of Appeals for the Ninth Circuit, the Union argued that Section 8(b)(4)(A) proscribes a strike directed at forcing an employer to become a member of an existing employer organization, but that it does not proscribe Union action taken to force employers to bargain on a group basis. The Union also contended that the trial court's findings of fact nos. 21-22, 24-25, and 29 relating to the question of liability and the trial court's findings of fact nos. 1-2 relating to the award of damages were all clearly erroneous. The Union argued that its attempt to obtain common contracts from the three companies was motivated by legitimate bargaining concerns rather than a desire to force the three companies to form a multi-employer group and that, in any event, it had abandoned its demand for a common contract prior to the strike. The Union further contended that Frito-Lay was not entitled to damages because there was not substantial evidence that the Union's illegal objective alone would have caused the strike.

The court of appeals agreed with the district court's interpretation of Section 8(b)(4)(A). It affirmed the judgment of liability, but limited it to the period of the strike from May 12 to June 7, rather than from May 12 to June 29 as found by the trial court.[4] It remanded for further proceedings on the question of damages.

With respect to the proper interpretation of Section 8(b)(4)(A), the court of appeals stated that while no NLRB

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[4]By limiting Frito-Lay's damages to those sustained from May 12 to June 7, 1974, rather than those sustained during the entire strike period (May 12 - June 29, 1974), the court of appeals has substantially reduced, by over 40 percent, the amount of the trial court's judgment.

decision had reached the precise issue before it, the pertinent NLRB decisions did not emphasize formal membership in an existing organization as a necessary component of a Section 8(b)(4)(A) violation. *Frito-Lay, Inc. v. Local Union No. 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 623 F.2d 1354, 1358 (9th Cir. 1980). In fact, the court below noted, neither the Board nor the courts have ever required that employers organize themselves into a formal association to be considered an employer organization for purposes of the Act. Thus, the court of appeals reasoned that it would be "unlikely that Congress sought in Section 8(b)(4)(A) to prohibit a Union from forcing an employer to become a member of an employer organization but to permit a union to force competing employers to bargain together as an informal group." *Id.* The court of appeals found further support for the district court's interpretation of Section 8(b)(4)(A) in the legislative history of the Act, which indicates that Congress was concerned with forced multi-employer bargaining in general, not with forced membership in an existing organization. In view of that legislative history, the court of appeals agreed with the district court in concluding that Section 8(b)(4)(A) prohibits coercive union conduct with the object of forcing employers to engage in multi-employer bargaining, whether as a formal association or an informal group. *Id.*, at 1358-59.

Upon review of the record made at trial, the court of appeals concluded that there is substantial direct evidence to support the district court's finding of illegal motive and that the district court's finding of an illegal union objective to force multi-employer bargaining is not clearly erroneous. *Frito-Lay, Inc., supra,* 623 F.2d at 1360-1361. The court likewise concluded that substantial evidence supports the

district court's finding that the Union's illegal motive continued up to and was a substantial cause of the strike. The court below found clearly erroneous, however, the district court's finding that the illegal objective continued for the duration of the strike against Frito-Lay. The court of appeals found, rather, that the illegal purpose was abandoned on June 7, 1974, when the Union ratified a separate contract with Goose.[5] *Id.*, at 1362. Finally, the court of appeals sustained the district court's factual finding that the Union's illegal objective was at least a substantial — if not the sole — cause of the strike, thus entitling Frito-Lay to recover all damages attributable to the strike. *Id.*, at 1363.

SUMMARY OF ARGUMENT

Contrary to the suggestion of the Union's Petition, the decision of the court below definitely does not stand for the proposition that a strike to secure uniform wages and working conditions for employees of competing employers constitutes a violation of Section 8(b)(4)(A) of the Act. Rather, the court of appeals merely found that substantial evidence in the record, including the Union's demand for a multi-employer contract, supports the factual finding of the district court that the object of the Union's strike was to force or require Frito-Lay to bargain and act as if it belonged to an

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[5]Pursuant to Rule 19.5 of the Rules of the Supreme Court, Frito-Lay has this day filed a conditional cross-petition for writ of certiorari, seeking review of the court of appeals' ruling that the illegal purpose was abandoned on June 7, 1974. As shown in Frito-Lay's cross-petition, substantial evidence in the record supports the district court's finding that the illegal objective was not abandoned prior to the cessation of the strike against Frito-Lay.

employer organization. In particular, the court below affirmed the finding of the trial court, based largely on the testimony of Union negotiators, that the Union's intent was to force the three competing employers to bargain as a multi-employer group.

No special and important reasons warrant this Court making a second review of the district court's factual findings. Resolution of the question presented would only affect the parties before the Court and would have no impact on future collective bargaining. The decision below is not in conflict with any reported decision.

REASONS FOR DENYING THE PETITION

I.

PETITIONERS' STATEMENT OF BOTH THE QUESTION PRESENTED AND ALSO THE REASONS FOR GRANTING THE PETITION ARE BASED UPON AN ERRONEOUS FACTUAL PREMISE NOT SUPPORTED BY THE RECORD OF THIS CASE.

Petitioners' statement of the question presented is based upon the erroneous premise that the district court found, and the court of appeals affirmed, a violation of Section 8(b)(4)(A) of the Act merely upon the basis of the following evidence:

> that the striking unions [sought] uniformity of contract conditions for all of the struck employers following the dissolution of a multi-employer, multi-union bargaining unit in which the employers and unions previously bargained.

Likewise, in the section of the Petition entitled "Reasons for Granting the Petition," Petitioners assert that the decision below stands for the proposition that "a strike to secure common terms and conditions of employment for employees of competing employers may be made the basis for a finding that the striking union has violated Section 8(b)(4)(A) of the Act." (Petition, at 15)[6]

The Union's premise for the question presented and the Union's characterization of the holding of the court below are false, misleading, and relate to a factual record that is not before this Court. Even a cursory reading of the district court's findings of fact and of the decision of the court of appeals indicates that liability was imposed upon the Union in this case not for seeking common terms and conditions of employment for the employees of three competing employers, but rather for forcing Frito-Lay to bargain and act as if it belonged to an employer organization. Moreover, the district court, sustained by the court of appeals, did not reach its ultimate liability finding based merely upon inferences derived from the Union's alleged objective of seeking common terms and conditions of employment. Many additional facts, including the admitted intent of the Union to reconstitute the erstwhile employer organization, were relied upon by the district court in reaching its ultimate factual finding.

Having corrected the factual premise of the Union's

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[6]At page 14 of the Petition, the Union asserts that no provision of the Act has ever been invoked to challenge the lawfulness of union efforts to attain uniform contractual provisions with competing employers whose employees they separately represent. On the contrary, the Union argued to the district court that because union insistence that an employer sign a contract applicable to another employer may violate Section 8(b)(3) of the Act, such conduct cannot also violate Section 8(b)(4)(A). (R. 121)

position to conform to the record of this case, it is apparent that the Union's challenge of the district court's decision and of its affirmance by the court of appeals is not based upon a disagreement over applicable legal principles. The Union has conceded, "at least for the purposes of this case," that Section 8(b)(4)(A) proscribes forced multi-employer bargaining and not merely forced membership in a formal multi-employer organization. (Petition, at 12) Thus, the Union no longer challenges the district court's interpretation of the scope of the Section 8(b)(4)(A) proscription. Rather, it challenges the factual finding that the Union did have the illegal objective of forcing Frito-Lay to bargain and act as if it belonged to an employer organization.

Accordingly, a fair and accurate statement of the question presented by the Petition is whether the district court's factual finding that the Union's strike had the illegal objective of forcing Frito-Lay to bargain and act as if it belonged to an employer organization is supported by the evidence in the record, not just the one category of evidence conveniently and repeatedly referred to by the Union as if it were the only evidence in the record.

II.

THE FACTUAL FINDING THAT THE UNION'S STRIKE HAD THE ILLEGAL OBJECTIVF OF FORCING FRITO-LAY TO BARGAIN AND ACT AS IF IT BELONGED TO AN EMPLOYER ORGANIZATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The district court's ultimate factual finding on liability was that the Union struck Frito-Lay with the illegal objective of forcing or requiring Frito-Lay to bargain and act as if it belonged to an employer organization. (Findings, ¶ 29, R. 387) The Union would have this Court believe that such finding was based merely on the evidence that the Union sought uniform contract provisions among competing employers.[7] That suggestion is false and misleading. Frito-Lay never argued, and neither the district court nor the court of appeals ever held, that mere insistence upon uniform contract provisions constitutes a violation of section 8(b)(4)(A). The decision of the court of appeals does not, as suggested by the Union, stand for such a proposition.

Upon reviewing the evidence in the record, the court of appeals concluded that there is substantial direct evidence to support the district court's finding of illegal motive. The Union's suggestion that such finding of illegal motive was merely inferred from the Union's insistence upon uniform contract provisions is refuted by the district court's findings, by the appellate court's decision, and by the evidence in the record.

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[7]Petitioners' statement of the question presented for review reflects this erroneous characterization of the district court's decision. (Petition, at i)

The district court found that the intent of the Union's negotiating committee was to force the three companies to reconstitute the employer organization and to negotiate a multi-employer contract. (Findings, ¶ 15, R. 384) The distict court further found that the Union used group voting to insure the ratification of a multi-employer contract and to force or require the three companies to reconstitute the employer organization. (Findings, ¶ 24, R. 386) As pointed out by the court of appeals, direct evidence in the record demonstrates that the Union's members were sorely disappointed by the breakup of the multi-employer organization, with which the Union had negotiated five successive multi-employer contracts, and that the Union tried to perpetuate past bargaining practices by negotiating either a multi-employer contrat or three separate, but identical contracts.

Not only did the Union seek the same results as in the past, a multi-employer contract, it also used tactics designed to force the three companies to bargain together as if an employer group to achieve that result. For example, the district court found that the Union's "negotiating committee arranged joint meetings to force the three companies to negotiate identical contract language." (Findings, ¶ 23, R. 385) As noted by the court of appeals, the Union negotiators on several occasions expressed the "[w]ish [that] all you companies would get off your butts and get together," to come up with uniform language. These are items of direct evidence that the Union forced Frito-Lay to bargain on a multi-employer basis.

The court of appeals also notes that sworn testimony by the Union's negotiators supports the district court's finding that part of the Union's strategy was to persuade the companies to reinstate the erstwhile employer organization and that they utilized tactics designed to accomplish that

goal. The court of appeals quoted from the testimony of Union negotiator Marashian as one example of such direct evidence. Contrary to the assertion of the Union's Petition, however, the quoted Marashian testimony is not the only testimony in the record supporting the district court's factual finding. For example, Mr. Salido, co-chairman of the negotiating committee, testified that even after the dissolution of the multi-employer group, the negotiating committee "felt we should still negotiate the same way." (Salido Depo. at 26) Another Union negotiator's notes of a bargaining session reflect his understanding that Scudder's felt it was being forced into a multi-employer bargaining group. (Plt. Ex. 110) Mr. Salido and Mr. Marashian testified that the tactic of group voting was designed to prevent the negotiation of separate, non-uniform contracts. (Salido Depo. at 25; Marashian Depo. at 48) Some members of the negotiating committee questioned the use of group voting after the breakup of the employer organization. (Marashian Depo. at 17) For, as Marashian and Webb testified, the Union had never used group voting except when bargaining with an employer organization. (Marashian Depo. at 15-16; Webb Depo. at 21, 15)

Finally, the court of appeals stated that the context and history of the negotiations added further support to the district court's finding that the Union intended to force multi-employer bargaining. It thus concluded that

> a past history of successful multi-employer bargaining, coupled with direct evidence of union intent to continue bargaining on a multi-employer basis and resort to coercive tactics designed to implement that intent, establish an overall pattern of conduct supporting the district court's finding of an illegal union objective to force multi-employer bargaining.

Frito-Lay, Inc., supra, 623 F.2d at 1361.

Expressly refuting the Union's contention to the contrary, the court of appeals concluded that the district court did not rely solely on the effect of the Union's conduct to establish the illegal motive. In fact, the court of appeals agreed with the Union's contention "that where certain tactics are susceptible of innocent as well as illegal interpretation a court should hesitate to infer an illegal object based upon nothing more than mere conduct and its effects." *Frito-Lay, Inc., supra,* 623 F.2d at 1361.

The Union repeatedly asserts in its petition that the court below has equated multi-employer bargaining with seeking uniform contract provisions. That is not the case. The district court and the court of appeals closely examined the process of bargaining, not simply the end result of bargaining. For example, the district court found that the Union arranged joint meetings to force the three companies to negotiate identical language (Findings, ¶ 23, R. 385) and used group voting to force the three companies to re-constitute the employer organization (Findings, ¶ 24, R. 386). While some of the bargaining sessions between Frito-Lay and the Union were physically separate, the process of bargaining remained multi-employer for so long as Frito-Lay was forced to bargain over issues relevant only to its competittors. The Union forced Frito-Lay not to adopt, but instead to negotiate, bargain for, and draft a multi-employer contract. The Union offered the three companies no practical prospect of negotiating contracts that would be ratified by the membership, unless they reconstituted the employer organization and bargained together for uniform contract provisions.

III.

THE ADDITIONAL FACTUAL FINDINGS CHALLENGED ONLY IN THE EVENT THE PETITION IS GRANTED ARE ALSO SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

If a writ of certiorari is granted to review the district court's ultimate finding of fact on liability, and if the court declines to reverse the decision below on that issue, Petitioners request that the Court review two additional issues. Because the Union does not contend that either of these additional issues would warrant granting of the writ, the Court should not consider them in ruling upon the Petition. Nevertheless, Frito-Lay will respond briefly to each issue raised.

First, substantial evidence in the record supports the district court's finding that the Union did not abandon its illegal objective prior to commencement of the strike. The Union contended at trial and on appeal that because on May 1 it offered the possibility of separate compensation systems, it no longer could be said to have required the companies to bargain together on a multi-employer basis. As stated by the court of appeals, however, on May 10, 1974, two days before the strike, the Union's chief negotiator advised Frito-Lay that a strike over common language appeared imminent because Frito-Lay had not revised its proposal to conform with the Goose proposal. Moreover, even after May 1, the Union continued to employ group voting and to demand that each employer accept provisions inapplicable to its employees. Thus, the court of appeals concluded that the Union's purported willingness to allow the possibility of

separate compensation systems was so grudging as to conclude it was not genuine.[8]

The Union contends in its petition that the reasons given by the court of appeals are completly unpersuasive, because the "genuineness of the Unions' change of position is demonstrated by subsequent bargaining. . . ." (Petition, at 29) To the contrary, at the first bargaining session with Frito-Lay after the commencement of the strike (May 29, 1974), the Union reiterated its demand for a single contract and stated that separate compensation systems for each company would not be tolerated. (Clegg's testimony at liability trial, Tr. 54-55) Even after a separate contract with Goose was ratified on June 6, the intent of the negotiating committee remained to have Frito-Lay and Scudder's sign contracts identical to the Goose contract. (Webb Depo. at 69)

Second, substantial evidence supports the district court's finding that the Union's illegal objective was a substantial — if not the sole — cause of the strike, thus entitling Frito-Lay to damages attributable to the strike.

The court of appeals applied the standard of *Mead v. Retail Clerks Local* 839, 523 F.2d 1371 (9th Cir. 1975), in reviewing the Union's contention on appeal that because the strike had lawful[9] as well as unlawful objectives, Frito-Lay

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[8]Frito-Lay argued to the district court that the Union's purported willingness to allow separate compensation systems was a sham. (R. 376)

[9]This is a curious argument in that there was no finding by the district court that the strike had any lawful objective. (R. 380-388) Nor did the Union ever propose such a finding. Thus, the premise of the Union's third question presented—"the conceded fact that the strike was waged to secure economic benefits and improved working conditions" (Petition, at i)—is false and misleading.

was not entitled to receive damages. The court of appeals correctly noted that *Mead,* based upon traditional tort law principles, does not require that the illegal object be the sole cause of the strike, only that it be a substantial cause of the strike. Thus, the district court properly assessed damages attributable to the strike on the ground that the illegal objective was at least a substantial — if not the sole — cause of the strike.

IV.

NO SPECIAL AND IMPORTANT REASONS WARRANT REVIEW ON WRIT OF CERTORARI.

Notwithstanding the Union's statement to the contrary, the decision below clearly does not stand for the proposition that a strike to secure uniform contract terms for employees of competing employers may be made the basis for establishing a violation of Section 8(b)(4)(A) of the Act. Nor does the decision below stand for the proposition that forcing competing employers to accept common terms and conditions of employment for their employees is the equivalent of forcing multi-employer bargaining. Because the court of appeals decision does not stand for these propositions attributed to it by the Union, it will not and cannot have a "devastating effect . . . on established collective bargaining practices. . . ." (Petition, at 14)

To the contrary, the court of appeals merely reviewed the evidence in the record supporting each factual finding challenged by the Union and concluded that each finding at issue here was supported by substantial evidence and was thus not clearly erroneous pursuant to Rule 52 of the Federal

Rules of Civil Procedure. The court of appeals reiterated and endorsed the principle that uniformity of labor standards is a legitimate goal of collective bargaining. Moreover, the court of appeals expressly recognized that the tactics utilized by the Union in this case — *e.g.*, group voting, conditional acceptance, insistence on inapplicable provisions — may be "acceptable collective bargaining techniques when the Union employs them to achieve a legitimate goal, such as uniformity in working conditions." *Frito-Lay, Inc., supra,* 613 F.2d at 1359. Thus, the decision does not preclude Unions from using these tactics to achieve the legitimate goal of uniform wages and working conditions.

The court of appeals only held that such tactics, although innocent in and of themselves, can in context become part of an illegal overall pattern of conduct. Likewise, in *Utility Workers Union of America (Ohio Power Co.)*, 203 NLRB 230, 83 LRRM 1099 (1973), *enforced,* 490 F.2d 1383 (6th Cir. 1974), the Board stated that uniformity of labor standards is a legitimate union goal and that joint voting among the employees in separate units is not, *per se,* a violation of Section 8(b)(3) of the Act.[10] But the Union's insistence upon identical contracts and group voting, when viewed in the context of the facts of that case, evidenced the Union's objective to force the three companies into one multi-employer bargaining unit, in violation of Section 8(b)(3). The Board reasoned that a "policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal overall pattern of conduct." 83 LRRM at 1103. *Accord. NLRB v. Insurance Agents' Union,* 361

[10]Section 8(b)(3) of the Act makes it an unfair labor practice for a labor organization to refuse to bargain collectively with an employer.

U.S. 477, 506 (1980) ("The plan may make the parts unlawful.")

In this case, the district court did not impose liability on the Union for having fought for uniform wages and working conditions, nor for having used group voting or for seeking common contracts. Rather, the district court found that the object of defendants' strike was to force Frito-Lay to act and bargain as if it belonged to an employer organization. In particular, the district court found, based in large part upon the testimony of Union negotiators, that the Union's intent was to force the three companies to bargain as a multi-employer group. As stated by the court of appeals, that illegal intent "taints the more ambiguous activities of group voting, demands for inapplicable and uniform conditions, and conditional acceptance of contract provisions." *Frito-Lay, Inc., supra,* 613 F.2d at 1361. Moreover, the district court "did not rely solely on the effect of the Union's conduct to establish the illegitimate motive." *Id.*, at 1361.

Thus, no special and important reasons warrant this Court's review of the question presented on writ of certiorari. The issue is whether substantial evidence in the record supports the district court's finding. The court of appeals has reviewed the evidence and sustained the district court's findings. For this Court to reject the findings of the district court, accepted by the court of appeals, it would be forced to disregard this Court's repeated pronouncements that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 536 U.S. 271, 275 (1949). *Accord, Berenyi v. District Director, Immigration and Naturalization Service,* 385 U.S. 630, 636 (1967).

A further review of the evidence and a decision by this

Court will only affect the parties before it. No principles of law require resolution. A decision to affirm or reverse would merely relate to the quantum of evidence in this case; it would have no effect on collective bargaining in the future.

Finally, the decision below is not in conflict with the decision of another federal court of appeals on the same matter. The district court's Memorandum of Opinion has been uniformly cited with approval. *Union de Tronquistas de Puerto Rico v. Arlook,* 586 F.2d 872, 876, n. 3 (1st Cir. 1978); *Mobile Mechanical Contractors Association v. Carlough,* 456 F.Supp. 310, 315, 333-334 (S.D.Ala. 1978); *Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers,* 442 F.Supp. 431, 436 (N.D. Cal. 1977). The case is thus inappropriate for review on certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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